

No. 14629

United States
Court of Appeals
for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Appellant,
vs.

CLARA STINTZI, Guardian Ad Litem for Gerald
Stintzi, a minor, Appellee.

Transcript of Record

In Two Volumes
VOLUME II.
(Pages 465 to 920, inclusive.)

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

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(Testimony of Howard V. Valentine.)

(Whereupon, the said hospital bill was admitted in evidence as Plaintiff's Exhibit No. 34.)

Mr. MacGillivray: And ask the admission of Plaintiff's Exhibit 35, the statement from Schindlers Artificial Limb Company in the sum of \$662.81, the cost of artificial limb work.

Mr. Cashatt: No objection.

The Court: Has that been marked by the Clerk and numbered?

Mr. MacGillivray: No. 35.

The Court: 35.

Mr. Cashatt: No objection.

The Court: It will be admitted.

(Whereupon, the said statement was admitted in evidence as Plaintiff's Exhibit No. 35.)

Mr. MacGillivray: No. 36 is receipts and checks paid to various special nurses for special nursing given to Gerry Stintzi while in the hospital, totaling \$2,164.00. [544]

Mr. Cashatt: No objection.

The Court: It will be admitted.

(Whereupon, the said receipts and statements were admitted in evidence as Plaintiff's Exhibit No. 36.)

The Court: Are you ready to show those?

Mr. MacGillivray: Yes.

Q. Doctor, we are going to show these pictures. Could you explain them to the jury for us, just what they show? A. Yes.

(Testimony of Howard V. Valentine.)

The Court: I think I will take a short recess before we proceed with that. I want to **finish** tonight, if you prefer to do so.

The Witness: I would, Judge.

The Court: We will recess, then, for about five or ten minutes.

(Whereupon, a short recess was taken, after which the following proceedings were had before the bench out of the presence of the jury:)

Mr. Etter: May we approach the bench?

The Court: Yes. [545]

The Court: For counsel's guidance here in the matter of getting your witnesses—of course, I have no means of telling how nearly you are getting to the end of your case or **what**—

Mr. Etter: We have only one more witness, I believe, your Honor.

Mr. McKevitt: Are you through with Dr. Valentine?

Mr. Etter: He is going to explain these.

The Court: You have one more?

Mr. Etter: That witness is available and we can finish in short order.

The Court: Rather than have a night session, I think perhaps we would cover just as much ground, I have in mind tomorrow convening at 9:30. I have a dental appointment at 9 so that 9:30 is the best I can do. It crowds things a little bit. I had to get down there at 12:30 today. At any rate, I propose to convene at 9:30 in the morning and run until 12, and then from recess until about

(Testimony of Howard V. Valentine.)

6 o'clock tomorrow night, and then that way we can get in four hours in the afternoon, which is a California day in Federal Court.

Mr. Cashatt: If your Honor please, may the record show that the stipulation entered into with counsel concerning the equipment, and so on, was made for the purpose of supporting the objection which the defendant has raised to the showing of the pictures here? [546]

The Court: Yes, that may be understood and, of course, it isn't to be construed as any waiver of your objection. That is what you had in mind?

Mr. Cashatt: That is correct.

The Court: All right, bring in the jury, then.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: All right, proceed.

Mr. Etter: These are exhibits, ladies and gentlemen, from 26 to 33, inclusive. Exhibit 26.

Q. (By Mr. MacGillivray): Dr. Valentine, showing you on the screen what is Plaintiff's Exhibit 26, would you explain to the jury just what that shows?

A. That shows, viewing from behind, the right thigh. As we can understand, these are prints from the negatives so it looks as though it is the left, but it is the right thigh at the site of the amputation viewed from behind.

Mr. Etter: Exhibit 27.

Q. (By Mr. MacGillivray): One question, Doctor, at the bottom of the right thigh shown in Ex-

(Testimony of Howard V. Valentine.)

hibit 26 seems to be a bandage of some sort. Is that covering an ulcerated—— [547]

A. That is a Band-Aid, I believe, covering the area of the most appended portion of the amputation where a blister developed.

Q. Showing you on the screen what is marked as Plaintiff's Exhibit 27, Doctor, just what does that show?

A. That shows the left thigh, with dimpling of the skin in the four areas along the outer aspect, those being the site of the pin insertions for reduction and treatment of the fracture of the left thigh bone. It also shows some areas from which skin has been removed from the abdomen.

Q. Those four areas on the left thigh, are they indentations or kind of holes in the——

A. They are indentations in the skin where the tissue contracted down and caused the dimpling of the skin at that area.

Mr. Etter: Exhibit 28.

Q. (By Mr. MacGillivray): Showing you, Doctor, what is marked as Plaintiff's Exhibit 28 on the screen, just what does that exhibit show?

A. That exhibit shows the disarticulation of the right thigh, the disarticulation stump viewed from in front, and also shows the areas of the abdomen from which skin was removed to cover this stump.

Q. And skin was taken from the abdomen up how far? [548]

A. To the rib margins and slightly above.

Q. Up to the ribs?

(Testimony of Howard V. Valentine.)

A. Rib margins and slightly above.

Mr. Etter: Exhibit 29.

Q. (By Mr. MacGillivray): Showing you on the screen, Doctor, Plaintiff's Exhibit 29, just what does that show?

A. That again shows the disarticulation stump, shows the donor sites or the areas from which the skin grafts were taken, and shows a scar on the right lower chest region which was an abrasion occurring at the time of his injury.

Mr. Etter: Exhibit No. 30.

Q. (By Mr. MacGillivray): And showing you on the screen, Doctor, Exhibit No. 30, just what does that show?

A. It shows similar fracture to that shown in the previous film, this view being taken from the side, showing the disarticulation stump, the sites from which the grafts were taken to cover the stump, and the scarred area above the region from where the grafts were taken.

Q. And is that scarring on the stomach there a permanent condition, Doctor?

A. Beg pardon?

Q. Is that scarring on the stomach shown there a permanent condition?

A. Yes, that from which the grafts were taken, as well as [549] that other scar, are permanent, because the pigmented areas of the skin are removed in the grafts.

Q. How many actual skin grafts did you take off that scarred area?

(Testimony of Howard V. Valentine.)

A. I don't have the slightest idea, I didn't count them.

Q. A few or very many?

A. A great many.

Q. A great many. Very well.

Mr. Etter: No. 31.

Q. (By Mr. MacGillivray): Exhibit No. 31 shown on the screen, Doctor, shows what?

A. It shows what we have seen previously in regard to the trunk and the amputation stump; also shows the scars, and in the right forearm on the outer aspect the site of the open operation for reduction of both bone fractures of the forearm, and the same scar, being for removal of the plates at a later date.

Q. The various scars on that right forearm from the elbow region down are the sites of your operative procedure on that forearm?

A. You only see one operative site there. The other scars were scars from the injury.

Q. Scars from the dragging, scars from the injury.

Exhibit No. 32 shown on the screen, Doctor, shows what? [550]

A. Similar to the previous film, showing again the disarticulation stump, the donor sites and the scarring.

Mr. Etter: 33.

Q. (By Mr. MacGillivray): 33 shown on the screen, Doctor, depicts just what?

A. Shows much that has been shown before,

(Testimony of Howard V. Valentine.)

plus the wound in the lower mid-portion of the abdomen, the site of the operation to drain the bladder.

Q. Is that the scar or irregular area shown just above the upper left leg on the stump?

A. No, the scar I speak of is the scar just below the navel.

Q. And then to the left of that on the picture appears to be a scar, Doctor. Is that a scar or what is that? A. On the left as we view it?

Q. Yes?

A. That is another area that was grafted for skin.

Mr. MacGillivray: That is all.

The Court: Take the stand again, Doctor.

Let's see, Mr. Hagin hasn't been cross-examined, either, has he?

Mr. Etter: No, he has not.

The Court: He will have to stay here, then. You wish to conclude with Dr. Valentine first. Are you through with the direct examination of Dr. Valentine? [551]

Mr. MacGillivray: Yes.

Mr. McKevitt: We have no cross-examination.

Mr. MacGillivray: That is all, Doctor.

The Court: You may be excused, then, if that is the case, Doctor.

The Witness: Thank you, your Honor.

(Witness excused.)

The Court: Do you have any cross-examination of Mr. Hagin?

(Testimony of Howard V. Valentine.)

Mr. Cashatt: No, your Honor.

The Court: No cross-examination?

Mr. Cashatt: No cross-examination.

The Court: All right, Mr. Hagin may be excused, then, when he gets his paraphenalia together.

(Witness excused.)

Mr. Etter: Mrs. Stintzi, will you take the stand, please. [552]

CLARA M. STINTZI

called and sworn as a witness on her own behalf, testified as follows:

Direct Examination

Q. (By Mr. Etter): Your name is Clara M. Stintzi? A. Yes, it is.

Q. Mrs. Stintzi, there isn't anybody going to hear you if you talk like that. A. Yes, it is.

Q. All right, you speak up so the people on the end can hear. You have been here and you know how hard it is to hear. A. Yes.

Q. You live at 420 East Olympic here in Spokane? A. Yes, I do.

Q. And you are the mother of Gerald Stintzi? A. Yes.

Q. And his guardian ad litem in this action? A. Yes, sir.

Q. You have two other children in the home with you, the young boy, who is 14, and the daughter, 10; is that correct? A. Yes, I have.

(Testimony of Clara M. Stintzi.)

Q. And you have been in Spokane about how long, Mrs. [553] Stintzi?

A. About, I imagine, 14 years. About that.

Q. About 14 years. Were you in Spokane when the accident occurred to Gerald?

A. I was called to Minneapolis, Minnesota.

Q. You were at Minneapolis, Minnesota?

A. Yes, sir.

Q. And where were the other two children?

A. They were with me.

Q. In Minneapolis? A. Yes, sir.

Q. And when you went back to Minneapolis, where was Gerald? A. Gerry stayed here.

Q. Stayed here with Ray Davis?

A. Yes, sir.

Q. During the time you went to Minneapolis, is that correct? A. Yes, he did.

Q. Now, Mrs. Stintzi, after this accident occurred, had you returned to Spokane shortly after?

A. I flew back just as soon as I heard.

Q. You flew back? A. Yes.

Q. And when did you arrive in Spokane, that is, with relation to the accident which happened on July 17th? [554]

A. The following evening about 8 o'clock.

Q. The following evening about 8 o'clock?

A. Yes.

Q. And after you returned to Spokane, where did you go? When you got back to Spokane?

A. I went home—oh, I went right straight to the hospital.

(Testimony of Clara M. Stintzi.)

Q. You went to the Sacred Heart Hospital?

A. Yes, I did.

Q. And did you see Gerald at that time?

A. Yes, I did.

Q. And you saw his condition?

A. Yes, I did.

Q. Was he conscious then?

A. He was in deep shock.

Q. Beg pardon?

A. He was in deep shock.

Q. I see. Now will you tell us, were you in attendance or not with him up there at the hospital?

A. I stayed with him night and day all the time.

Q. You were with him night and day?

A. Yes.

Q. Do I understand that you stayed right at the hospital?

A. Yes, I did, and helped take care of him.

Q. And how long, Mrs. Stintzi, did you stay with your son [555] at the hospital night and day? How many days, do you recall?

A. Oh, yes, I imagine a good two months that I would just go out just long enough to eat or something.

Q. Did you leave the hospital during that time?

A. Oh, just over to the—I had my other two children staying about two blocks away. I would run over there to see how they were.

Q. I see. A. Then right back.

Q. Did you do something toward assisting Gerald?

(Testimony of Clara M. Stintzi.)

A. Yes, I would help give packs to his stump.

Q. Have you had some training in that work?

A. Yes, I am a graduate nurse.

Q. You are a graduate nurse? A. Yes.

Q. And you did work up there for Gerald and assisted, is that right? A. Yes, I did.

Q. During all of this time? A. Yes.

Q. And after these first two months or so that you stayed with him day and night, can you tell us then what your usual schedule was in visiting him?

A. Oh, three times a day I would come back. I would get [556] there early in the morning to give him his bath and, of course, the bed pan, why he was kind of embarrassed, so I would help get him on it and clean.

Q. I see, because he didn't want the younger nurses. Speak up, please.

A. Then I would get back in the afternoon before his nap and rub him and see that everything was comfortable. And then in the evening, I would wash him up, and, in fact—

Q. How long did you do that?

A. Until he was dismissed.

Q. Until he was dismissed? A. Yes.

Q. Regularly? A. Yes, I did.

Q. During the time that you were up there, Mrs. Stintzi, of the first two months that you have talked about, the remaining time when you were helping him, did you have a chance to observe his condition as to pain and suffering?

(Testimony of Clara M. Stintzi.)

A. It was intense; in fact, the opiates didn't help.

Q. Did that continue for sometime?

A. For nearly two months, I know a good 9 weeks.

Q. And would that be during both the day and night?

A. Yes, it was. It wore off, within three hours it wore [557] right off.

Q. Were you up with him a considerable part of the evening and night during those first two months?

A. I stayed right by his bedside.

Q. I see. Until he was discharged, I understand?

A. Well, no.

Q. I mean you were there, as you have indicated, until he was discharged?

A. Oh, yes, yes.

Q. And after he was discharged, where was he taken?

A. Right to my home, because he still couldn't walk yet, he required absolute care yet.

Q. All right, who took care of him while he was home? A. I did.

Q. And do you know how long you took care of him, Mrs. Stintzi?

A. Do you mean that he was absolutely helpless?

Q. Yes?

A. Oh, let's see, he came home in March—a good two months.

Q. A good two months?

(Testimony of Clara M. Stintzi.)

A. Nearly, anyway.

Q. And the care that he has received in the two months that he was helpless at home and since that time, up until the present date, has been given to him by whom? [558]

A. By me.

Q. And are you still continuing that care?

A. Oh, yes.

Q. What is Gerald able to do now that he was able to do before his injury, Mrs. Stintzi?

A. Well, let's see, swims, but not in public. He goes to the "Y" because it is still embarrassing. And, of course, he goes to outdoor theaters.

Q. I see.

A. Because he can sit in a car.

Q. He hasn't competed in athletics, has he?

A. No. In certain gymnastics he has at the "Y".

Q. As he has indicated in his testimony?

A. Yes.

Q. Is he able to take a bath by himself?

A. No, because, see, when he extends his arm out, the fingers kind of close. Well, the way our bath tub is, you know, it wouldn't fit properly to hold to get in, so then I have to help him in.

Q. You do help him? A. Oh, yes.

Q. Is that regularly? A. Yes.

Q. And what other things do you help him do, Mrs. Stintzi? A. Take his bath. [559]

Q. Beg your pardon?

A. Take his bath, because he falls sideways. It would be pretty awkward.

(Testimony of Clara M. Stintzi.)

Q. That is correct. Any other things besides that?

A. Well, I couldn't leave the house and let him get a meal because he would have to leave his crutches in order to try to cook anything, he would fall.

Q. Does he require considerable care around the home? A. Yes, yes.

Q. That's right. And you are home, are you, quite constantly with him?

A. I don't leave him.

Q. You don't? A. No, I don't.

Q. And what is his situation, and what has it been the last few months, with regard to his sleep, Mrs. Stintzi? Have you been able to observe that?

A. Well, he is nervous. Yes, I can tell when he is awake at night because I come down. He gets too——

Q. What has been his condition?

A. He is very restless. He will go to sleep very tired and he will go sound asleep, but then sometimes he will wake up, you know.

Q. And has that been——

A. Change of weather or that. [560]

Q. Has that been sporadic at different times?

A. Yes.

Q. And does it continue yet?

A. Yes, it does, nerves.

Q. Now have you been able to observe whether he has endured any suffering in the past few months?

(Testimony of Clara M. Stintzi.)

A. Sure, he does. If he is on his leg too long, why, naturally, that bothers him.

Q. You know, of course, about the prosthesis that we secured, that is, this leg, wooden leg?

A. Yes.

Q. Has he tried to wear that?

A. He has tried hard.

Q. And has he been able to use that, Mrs. Stintzi?

A. No, because he can't manipulate it. It just hangs from the hip and then he has to swing his whole body with the straps around here (indicating), you know.

Q. Has he made a diligent effort to use it?

A. Yes, he has, he has tried hard. I thought at first he didn't, but, you know, when he first come home and then when Mr. Schindler said they re-fixed it inside, and then he really tried hard, but it just wouldn't work.

Q. Has he been able to wear it?

A. No, he can't, absolutely not.

Q. Mrs. Stintzi, this care that you have indicated, that [561] has continued since he came home, these various things you have told us, up to the present time?

A. Yes, it has.

Q. He has been going, however, to summer school, hasn't he?

A. Yes, he has.

Q. And has finished or will finish high school?

A. He will finish.

Q. In this summer school session?

A. Yes, sir.

(Testimony of Clara M. Stintzi.)

Q. Is that correct? A. Yes.

Q. Have you noticed any condition with regard to nervousness, Mrs. Stintzi?

A. He is high strung.

Q. And has that been recently or since this injury? A. Since the injury.

Q. And has it continued until this day?

A. Yes, it has.

Mr. Etter: That is all.

Mr. Cashatt: No questions, Mrs. Stintzi. Step down.

(Witness excused.)

Mr. MacGillivray: Your Honor, I think that is our last witness. Being 5 o'clock, I think we will, I am quite [562] sure we will recess in the morning, might we take a little time tonight?

The Court: I would suggest that you rest with the understanding that if you have some reason to reopen, the Court will favorably consider it.

Mr. MacGillivray: Plaintiff rests.

Mr. Etter: We will rest, then.

(Plaintiff Rests.)

The Court: The jury will be excused, then, until 9:30 tomorrow morning.

Now I am getting a little concerned about the time element here, members of the jury. I am sure we all wish to finish this before the 4th of July and not get fouled up in this long week end, and it may be necessary to have some overtime sessions. It will be necessary, I am sure, and perhaps a night session before we get through, so I am asking

you to come back half an hour earlier tomorrow and we will probably run until about 6 o'clock tomorrow night, if it is necessary.

Well, I think I better excuse the jury until 9:30. Remember, that is half an hour earlier than usual. So you will be excused until 9:30 tomorrow morning. [563]

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: What I had in mind here is that we could get this inevitable motion for directed verdict or for non-suit, whatever you wish to present at this time, out of the way tonight, and then we would either terminate the case or be ready for the jury in the morning.

I misunderstood Mr. McKevitt. He asked if he could be excused, he said he had to put in a long-distance call, and I thought he meant to go out and put in the call and come back. I didn't know he was going for the day.

Mr. Cashatt: I don't believe he will be back, your Honor. I didn't get to talk with him.

The Court: Was he going to make the motion here or argue the motion?

Mr. Cashatt: We both were, your Honor, to divide it.

The Court: I see. Well, I can hear your part of the argument, anyway.

I might say this, that, of course, it hasn't been my policy, and I think the Court of Appeals of the 9th Circuit has definitely indicated that they prefer to have these cases come up with all the evidence

in the record, unless it is an open-and-shut proposition that [564] there is no case for the plaintiff at the end of the plaintiff's case, and, of course, that is only common sense because these trials are expensive and, if there is any doubt about it at all, the sensible thing to do is to let the trial go through and submit it to the jury, and then under the Rules of Civil Procedure we can reconsider your motion for directed verdict at any time or judgment N.O.V., if the case is against you, at any time within 10 days.

Now the thing that I had in mind here that makes it awkward to finally dispose of this case, if I were inclined to do so, at this stage is that there isn't any evidence here as to the relationship between the Northern Pacific and Addison Miller. Your contract isn't in evidence. If they are an independent contractor, there is no evidence of it. This is all the record shows, I think, that that was all railroad property and Addison Miller was out there operating it. I think at this stage I couldn't say that they are independent contractors; I couldn't say that the railroad company wouldn't be bound by the foreman's negligence in not lighting the blue light.

And here we have got proof that this foreman of Addison Miller, who may for all this record shows have been in an agency relationship with the Northern Pacific, ordering this boy across this track and not putting up a blue light to protect him. So that is the situation that you [565] have at this state.

But I don't want to preclude you from making your argument. You may go ahead and argue.

Mr. Cashatt: Your Honor, I hesitate to start it tonight without Mr. McKevitt being here, because I think we could shorten it. There is only going to be one particular phase that we are going to argue, and that is on the question of invitee or trespasser as affecting the duty owed here. As far as on the other phases, where there is a disputed question of fact, I don't think we will argue those.

The Court: What is your contention was the situation of the minor plaintiff here, Gerald Stintzi, on the premises of the Northern Pacific; that is, when he crossed the track to dump the ice?

Mr. Cashatt: At the time, your Honor, and at the place and at the location itself, it is my position that he was a trespasser at that time, and that is the point that we would like to be heard on.

The Court: And if that is the case, you would owe him no duty except to refrain from wilful or wanton injury.

Mr. Cashatt: After knowing of his presence, your Honor.

The Court: Yes, after knowing.

Mr. Cashatt: And we will confine, I think, our entire argument to that, and I would like to let it go over [566] until morning, because Mr. McKevitt has done considerable work on that phase that I haven't.

The Court: Well, I wouldn't want to pass on it in his absence. He just asked if he could be excused and, of course, what he intended was excused

for the day, and I thought he was going out to put in a long-distance telephone call. In view of the time element here, I was trying to save as much time as possible. I should have had the jury come back at 10, I suppose, but then it won't hurt them to wait around. We may get through with this in a hurry.

I just wanted to point out that particular feature of it, that so far as the Addison Miller being an independent contractor, there is no evidence here of what the relationship was, and it would almost seem to me that the natural inference would be that if Addison Miller is there operating this thing and the foreman considered it necessary for them to go out and dump the ice, that they had a right to use the railroad premises for any purpose that was reasonably necessary to carry on their operation. And I don't know, of course, I haven't the contract before me.

Mr. Cashatt: Your Honor, our position on that, of course, is that it is the burden upon the plaintiff to establish and prove——

The Court: Yes, the negligence of the railroad company. [567]

Mr. Cashatt: Also, your Honor, the status of the plaintiff at the time, and I will have some law to cite your Honor, a late Washington case to cite your Honor, on that particular phase of it.

It will be our position that under the facts here, that the plaintiff has not established himself as an invitee at the time and place, other work there, and so on.

The Court: I recently had occasion to go into the law of Washington with reference to the various duties of an owner or occupier of premises toward an invitee, licensee and trespasser, and after going into the law of Washington very thoroughly and hearing the argument of counsel on both sides on the law of Washington, it suddenly dawned on me that this accident was at a race track over the line in Idaho, and I had to back up and start all over again and examine the Idaho law, and so I am fairly familiar with the law of both states now on that point, I think.

Well, the Court will adjourn then until 9:30 tomorrow morning.

(Whereupon, the trial in the instant cause was adjourned until 9:30 o'clock a.m., Thursday morning, July 1, 1954.) [568]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had in the absence of the jury:)

Mr. McKevitt: May I proceed, your Honor?

The Court: Yes.

Mr. McKevitt: May it please the Court and counsel, the plaintiff having rested, the defendant, in conformity with the Rules of Civil Procedure, moves the Court to instruct the jury to return a verdict in favor of the defendant railway company, for the reason and upon the ground there has been a total failure of proof to establish all or any of the material allegations of the amended complaint and/or the statement of the issues, and for the fur-

ther reason that the evidence now clearly demonstrates that at the time of his injuries, the minor Gerald Stintzi was a trespasser, and there is no allegation in the complaint that would justify submitting an issue to the jury on wanton or wilful negligence on the part of the defendant, and, secondly, and apart from that ground, that the plaintiff himself was guilty, or rather the minor was guilty of contributory negligence as a matter of law. [569]

We have a situation here where there is no factual dispute on the question of the type of work that the boy was performing at the time of his injury and the manner in which he was performing that work. The issues of that kind that we generally meet in personal injury cases are totally absent here.

Now I might preliminarily remark, with your Honor's permission, that counsel and myself, Mr. Cashatt and myself, feel that when the issues were finally drawn in this case from the original complaint and the amended complaint and a statement of the issues, that the conclusion was justified that a cause of action could not have been pleaded with more particularity than has been this cause of action, and with your Honor's permission and very briefly, I just want to refer, first, to the amended complaint.

Paragraph III charged that the Addison Miller Company had a contract with the Northern Pacific Railway Company for the performance of car icing operations. Parenthetically, I might remark that no

contract has been introduced and what its terms were are not apparent, and that if it is of any importance in this case, it was the duty of the plaintiff to have produced it, because they have had opportunity to examine it at great length and over any period of time that they chose. And in Paragraph [570] III they said that this young man at all times mentioned was engaged as a laborer in car icing operations.

In Paragraph IV of the original complaint, it is recited that he was engaged in the performance of his duties for this company and, with other employees of such company, was icing railway cars of the defendant, which cars had been spotted by the defendant for such purpose alongside the defendant's icing dock. And further in that same paragraph, it was alleged that we knew or should have known that the cars immediately adjacent to the loading dock were being iced and that the employees of the Addison Miller Company would be engaged in icing operations. And then they recite that on this particular day, while he was engaged in such icing operations, he was standing immediately alongside and partially between two cars, naming them, which cars, in a line of similar cars, had been placed by the defendant alongside of the icing dock of Addison Miller for the purpose of being iced.

Now there can be no question but what when we read that complaint, we had a right to believe that they were going to establish the fact that this boy was actually icing cars at the time that he was injured.

Well, in order to make assurance doubly sure, an amended complaint was filed, and going briefly to an analysis of that and particularly beginning with Paragraph III, [571] it was alleged that this company was engaged in business under and by virtue of a contract with the defendant—we admitted that—for the performance of car icing operations; that at all times mentioned herein Gerald Stintzi was employed by the Addison Miller as a laborer and, at the time of the accident herein alleged, engaged in car icing operations under the direction of the Addison Miller Company.

Again in Paragraph IV, it is recited that on this particular day he was working within the scope and course of his employment and within the line of his duty, along with other employees of said company, in icing cars for the defendant Northern Pacific Railway Company, which cars had been spotted alongside of the defendant's icing dock, and that at that time it was his duty to work and be "on, around and about the said railroad cars," which can only have reference, as I view it, your Honor, to cars that were actually there for the purpose of being iced.

The Court: Mr. McKevitt, I think it is hard for all of us older generation to realize how much the Rules of Civil Procedure have de-emphasized the pleadings and placed the whole emphasis on the proof in trials of lawsuits. The idea is to minimize, or even to almost prevent, a litigant from losing the enforcement of a legal right which he has because a lawyer may have put the wrong [572] alle-

gation in the complaint or pleading, so that if the proof doesn't conform to the pleadings here, the remedy would be for the Court to seriously consider a trial amendment. Assuming now that this proof is beyond the scope of the pleadings, then it would be the duty of the Court, under the Rules of Civil Procedure, to consider a trial amendment, and the only thing that you could do then would be to ask for a continuance on the grounds of surprise, and it seems to me you would hardly be in a position to do that because you took this boy's deposition on the 2nd of April and in that deposition he told you what he was doing and you knew at that time what he was doing at the time of his injury, so that you can hardly say that this is a surprise to you and you weren't prepared to meet it.

Mr. McKevitt: Well, I am not claiming surprise, except that we anticipated that after the deposition of the boy was taken we would be served with an amended complaint wherein they would set forth exactly what they knew, because as I understand it—

The Court: Well, the main purpose of pleadings, under the Rules of Civil Procedure, is to give the other party notice of what is going to be claimed and what is going to be contended, and if there is a variance, then, of course, the rules enjoin the Court to be very liberal in the matter of allowing amendments. So that the point [573] that I am making is that the question that I should be primarily concerned with is, unless there is so much

variance that there should be a stop to it, what does the proof show here.

Mr. McKevitt: Well, of course, our position, among others, your Honor, is there is a total variance between the allegations of both complaints and the statement of issues, even after—I think it was after, I am not sure—the deposition was taken of Gerald. Possibly it was before. Anyway, it was served on us on June 17th, plaintiff's statement of contentions, they didn't deviate at all from the main charge, main allegation, that he was engaged in car icing operations, that is, of the absolute recital in the fourth paragraph that on and prior to July 17, '52, the minor plaintiff was employed by the Addison Miller Company and was engaged as a laborer in the performance of said car icing operations.

The Court: Well, now, I don't know, but I presume probably the plaintiff would take the position that dumping slush ice from the apparatus used to ice the cars would be a part of the icing operations. Oiling machinery, I presume, would be a part of the icing operations, and dumping the slush ice out of the sump pit would be. If it is a variance, then certainly it is such a slight variance that the Court would favorably consider an application for [574] trial amendment to make the pleadings conform to the proof.

Mr. McKevitt: Well, proceeding, then, from the exact legal question your Honor has presented, I think that admitting that to be true for the pur-

pose of this argument, that this boy was still a trespasser.

The Court: Well, that is another point, of course.

Mr. McKevitt: Yes.

The Court: Yes.

Mr. McKevitt: Now they have admitted here at the time of his injury that he was injured while he was on railway property and not on property of Addison Miller as an employee.

The rule is generally stated in 44 American Jurisprudence, Section 431, at Page 652, under the heading "Under or Between Cars:

"Ordinarily, a person who is injured while attempting to pass under or between standing cars in a railroad yard is a trespasser, for whose safety the trainmen owe no duty of care in the absence of knowledge of his presence, and, in the absence of such knowledge, no liability is incurred by the railroad company for his injuries. There is [575] generally no reason for the train crews to anticipate the presence of persons crossing the track between cars of a train. Thus, due care ordinarily does not require trainmen to look under stationary freight cars on a switch before moving them to ascertain whether someone is sitting on the rails. Accordingly, the railroad company is not guilty of negligence where persons are injured while under or between cars without knowledge of the train employees, even though the railroad company knew that persons frequently cross at such points. In any case, it is said that only express consent will serve to

license a thoroughfare across a train. Where, however, the injured person was not a trespasser, as where the cars were standing on a track laid in the public highway, or where the injured person was using a gap between cars customarily placed so that the openings were left for persons to pass through on the way to and from the station, the railroad company may be [576] liable in the absence of due care.”

I am just going to call your Honor’s attention to two decisions, one from the Supreme Court of this state and the other from the Third Circuit, an opinion by Judge Clark.

The Washington case is that of Christensen vs. Weyerhaeuser Timber Company, 16 Washington (2d), at 424, and there is a rather lengthy recital of the facts. Would your Honor indulge me if I read the decision in its entirety, because I think it deals, at least it is our humble opinion—

The Court: I would rather, if you have it in mind, have you tell me.

Mr. McKevitt: I can give you the syllabus of it, yes:

“An officer of a ship moored to a wharf, who lost his life while endeavoring to make a connection between the ship’s electrical extension cable and an electrical fixture located on a pole on the opposite of the wharf, occupied, at the time of his death, the status of licensee as to the owner of the wharf, rather than that of invitee, where it appears that, at the time, the ship was [577] not engaged in loading operations, the pole was nowhere near the path

of ingress and egress between ship and shore, and there was no showing of any mutuality of interest between the wharf owner and the ship owners and their employees in the errand of the deceased at the time of his death, the purpose of making the connection being to furnish electricity to the ship after its generators were shut down, a matter in which the wharf owner had no interest.”

And, of course, it can't be contended in this case that we had any interest in the dumping of that ice in the manner in which the evidence shows it to have been performed.

Now going, then, to the portion of the opinion dealing with the law of the question on Page 431:

“The basis of this action is the alleged negligence of the respondent in failing to perform the legal duties devolving upon it. In determining the question of what its duties were, so far as the deceased was concerned, the legal relationship [578] between the parties must be considered.”

Citing a case in 3 Washington (2d), *Garner vs. Pacific Coast Coal Company*.

“The first question presented upon the appeal, then, is whether the evidence was sufficient to warrant a finding that the deceased, at the time and place of his death, was an ‘invitee’ of the respondent, rather than a mere ‘licensee,’ as those terms are understood in the law. Unless the deceased was an invitee there can be no recovery in this case, for there is no evidence, nor does appellant contend, that the deceased came to his death through

wanton or willful negligence on the part of the respondent.

It is the rule in this state that the only duty which the owner of premises, or the proprietor of a business conducted thereon, owes to a mere licensee is the duty not to injure such licensee wantonly or willfully."

Citing several cases.

"The rule as thus expressed does not [579] exclude liability on the part of the owner or proprietor for extraordinary concealed perils against which the licensee cannot protect himself, or for unreasonable risks incident to the possessor's activities. Such exceptional circumstances, however, are not involved here.

An invitee is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant of the premises is then engaged, or which he permits to be conducted thereon; and to establish such relationship, there must be some real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates."

Citing a number of cases.

"A licensee is one who goes upon the premises of another, either without any invitation, express or implied, or else for some purpose not connected with the business conducted on the [580] land, but goes, nevertheless, with the permission or at the toleration of the owner. * * *

Assuming that the deceased met his death by

falling or being thrown from the eastern, or inner, edge of the wharf, there is no evidence in this case that his presence at that point came about through any express invitation on the part of the respondent. If any invitation is to be found in the circumstances, it must be one by implication.

The cases hereinbefore cited all hold that the true test for determining whether there has been implied invitation to come upon the premises of an owner or occupant is mutuality of interest in the subject to which the business of the visitor relates. In *Gasch vs. Rounds*, *supra*, wherein this court definitely expressed such to be the test, we adopted the so-called Massachusetts rule as expounded in *Plummer vs. Dill*, 156 Mass 426," et [581] *cetera*, "in the following quoted paragraph:

'It is well settled there (England) that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must be at least some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant.'

In this connection, it is also the rule that liability upon an implied invitation is limited by the extent of the invitation and does not extend to injuries received on a portion of the owner's premises not covered by the invitation. In 38 Am. Jr. 761, *Negligence*, it is said:

‘An owner or occupant is liable for [582] an injury sustained by a person, who entered the premises by invitation, as a result of a defective condition of the premises only where the part of the premises upon which the injury was sustained was covered by the invitation. If a person, although on the premises by invitation, goes to a place not covered by the invitation, the owner’s duty of care owed to such person as an invitee ceases forthwith.’”

They refer also to *Corpus Juris* and *Shearman & Redfield on Negligence*.

“In this case the burden was, of course, on the appellant to prove that the respondent was negligent in the performance of some duty owing to the deceased, for the essential elements of actionable negligence are (1) the existence of a duty, (2) a breach thereof, and (3) a resulting injury. Since the respondent could be held liable, if at all, only upon the theory that the deceased was [583] an invitee at the particular time and place of the alleged injury resulting in his death, the burden rested on the appellant to prove that, as to the respondent, the deceased then and there occupied the legal relationship of an invitee. We do not believe that appellant met that burden.”

I suppose I should have earlier said that the appeal was from a ruling of the lower court which sustained the defendant’s challenge to the sufficiency of the evidence, and this affirmed the lower court so holding.

“It is appellant’s theory that the deceased lost

his life some time after five o'clock in the morning, while endeavoring to make a connection, or disconnection, between the ship's electrical extension cable and the Benjamin fixture located on the pole near the inner edge of the wharf. The ship and its crew were not engaged in loading operations at that time, nor was the pole located in the area where the activities of the crew in connection with loading operations were performed. Furthermore, [584] the pole was not on the side of the wharf where ships moored * * *

Then a further recital of the facts which are condensed in the syllabus portion I read.

“Most important of all is the fact that the evidence fails absolutely to disclose any mutuality of interest between respondent on the one hand and the ship owners and their employees on the other, in the alleged errand of the deceased at the time immediately preceding his death. There is no showing of any agreement or understanding between the respondent and the owners of the ship whereby the respondent obligated itself to furnish electricity to the vessel after it had shut down its generators. There is no showing of any benefit to the respondent in having lights on the ship after loading operations for the day had ceased. It was of no concern to the respondent how the ship, when idle, maintained its lights, whether by its own generators continuing to function as in the daytime, or whether [585] by kerosene lamps after the generators had shut down. In fact, it did not matter to the respondent whether the ship then had lights at all.

The saving of fuel by the vessel in shutting down its engines in no way affected the respondent.

It is true that the ship, through the members of its crew, made use of respondent's facilities by plugging a cable into the Benjamin fitting on the farther side of the wharf, but so far as the record discloses that was at most simply by permission of the respondent. In any event, the practice employed was solely for the benefit of the ship and its crew, and had nothing to do with any operation in which the respondent was concerned. Permission without mutuality of interest, however, simply constitutes a license, not an invitation; nor does long-continued use by permission convert a licensee into an invitee, for, as stated by Judge Pound in *Vaughan vs. Transit Development [586] Co.*, * * * a New York decision, "the law does not so penalize good nature or indifference nor does permission ripen into right.' "

And then the Court discusses other decisions of our own Supreme Court and, referring to the case then at bar, says:

"Appellant cites two of our cases defining the duties which the owners of docks and wharves owe to invitees on the premises." * * *

And then they proceed to distinguish those cases factually by saying:

"In both of those cases also is found the element of mutuality of interest, in that the injured person was at the time engaged in an activity in which the owner was directly or indirectly concerned or

from which he received a benefit. The situation here is entirely different, as demonstrated above.”

That is the important portion of the opinion I call to your Honor’s attention.

Now just one further Federal citation. I might [587] say we could multiply these by any number of additional authorities, but it is an opinion by Judge Clark. It is found in 120 Federal (2d) at 498, Circuit Court of Appeals, Third Circuit, decided May 8, 1941, and this is a short case and I would like to read it to your Honor.

The Court: Of course, our primary concern is with the law of Washington. If the State of Washington has settled the law on this, that is the law I must follow in a diversity case. The other would be persuasive, but not controlling.

Mr. McKevitt: There is some language in it I want to call to your Honor’s attention as illustrating the same rule in a different fashion, and your Honor knows, I am sure you have read quite a number of his decisions, he swings language differently than some of the rest of them.

The Court: Well, that’s right.

Mr. McKevitt: He says:

“The question of this appeal is both narrow and close. Such closeness is often inherent in the discovery of the line of demarcation between the functions of court and jury. It is particularly prevalent when the substantive rule itself is in some confusion. Law professors at both [588] Oxford and Cambridge have criticized the state of the law on

liability for 'condition and use of land.' The don from Oxford says: 'This chapter shows how closely the English and the American law of torts are related, for instead of establishing a rational system based on the general principle that a possessor of land should be under a duty of reasonable care depending on the facts of each case, the American law has imported from England all the complicated rules concerning business visitors, licensees, trespassers, etc. A French professor, who has been studying the English law of tort, recently wrote that these strict, detailed and often arbitrary rules seemed to him the least happy part of the body of law which, at best, he seemed to regard with more surprise than admiration. Only one thing can be said in favor of the American law: where there is a difference between it and the English [589] law, the advantage seems, as a rule, to be on the side of the American.' * * * Because of the lack of some such simple rule the courts are forced to struggle with evanescent distinctions of law and terminology among licensees, bare licensees, invitees, business guests, and patrons, and to follow the chameleon changes of one into the other. In the case at bar, the transformation is from invitee to licensee. That transformation depends in its turn upon a not always clear subsidiary principle. It has been stated by a leading text writer:

'A person is only an invitee as long as he keeps within the limit of his invitation. The invitation may be limited as to space, time, and method of user of the premises.

The invitee must use the premises in the manner contemplated by the terms, express or implied, of the invitation. If he uses them in a different manner he loses the protection to [590] which he is entitled as an invitee. In the words of Lord Atkin: "This duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use." As Scrutton, L. J. has pointedly said: "When you invite a person into your house to use the staircase you do not invite him to slide down the bannisters." " "

"Other writers," Judge Clark said, "speak of 'exceeding the invitation' or of 'uses which are outside the scope and purpose of the invitation,' and in New Jersey the courts employ the expressions 'coextensive with,' 'not within the limits of,' or 'circumscribed by,' the invitation. [591] As we are dealing with entrance upon property, we may expect to and do find a majority of precedents based on spatial considerations. This seems particularly so in New Jersey. The manner and purpose of use are, as we have seen, equally relevant to what the landowner should be required to expect. As the distinctions are all factual, citation of authority is only suggestive. We might mention two cases where the use was held to exceed the invitation as matter of law. In one, a fire escape had been converted into

a clothes' line and in the other a pig iron pile had served as a fulcrum for car loading.

In the case at bar the plaintiff was hurt because of an allegedly unchocked and carelessly braked freight car. He was the job superintendent of a wrecking contractor, Merberg & Sons. His 'master' was engaged in tearing down the buildings of the American Sugar Refining Company in Jersey City. As [592] is known, part of the profit in such operations comes from the salvage. The defendant company furnished steel gondola cars to carry away the metal scrap. The cars were run in on a siding that bisected the sugar refining plant. This was the position of the car whose unexpected movement caused the injury. The track ran and the car was placed between a 90 foot wall being pulled down and a crane doing the pulling. The method (a common one) of demolition was to attach a cable to the top of the wall and then to the loading drum of the crane. The hypotenuse of the triangle crossed the railroad siding at an elevation which brought the $\frac{7}{8}$ inch steel cable in contact with one edge of the car. The plaintiff superintendent wished to soften this contact and thus avoid deleterious scraping of the cable. He adopted the simple expedient of placing an old plank (8'x3"x8") between the cable and the car top. While he was so engaged, the car rolled forward [593] and the plank injured his legs. We think these facts bring the case within the 'outside of purpose' or 'excess of limitation' rule as a matter of law. The invitation to the wrecking contractor's employees went no further

than the loading of defendant's freight cars. The method by which the material to be loaded was procured was none of its concern. So the defendant-railroad company was not interested in the particular arrangement of wall, cable and crane. A fortiori it was not interested in the protection of the cable. In acting to preserve it from friction, plaintiff was serving his own employer's purpose and not coming within any use sanctioned by the railroad company. That the source of the friction was the defendant's car was fortuitous. The car could and would be loaded even if the cable was frayed. The learned trial judge was therefore in error in leaving the question of invitation to the jury. [594]

As the decision on this question is dispositive of the case, we shall, without reviewing the other questions * * *

And we think that that is just expressing the rule in language somewhat different than is employed by our Supreme Court.

Now, briefly, on the contributory negligence of the boy himself, as a matter of law, there is no question from the showing that is made here that he was an unusually bright and intelligent boy and certainly ought to have appreciated that when he attempted to perform this work in the manner that he did perform it, that he was certainly entering into a dangerous area, that the Court would take judicial notice of that fact, and the only excuse for him so doing would be that he was directed to place this ice on the opposite side of the track, but

no instruction, no evidence here, as I recall, that the foreman instructed him to crawl between those cars; and even though the foreman did instruct him to do so, the proximate cause of his injury was the negligence of the Addison Miller foreman, for which the Northern Pacific certainly should not be held responsible.

Mr. Cashatt, do you want to supplement that or not?

Mr. Cashatt: I might add a couple of words, your [595] Honor.

On the first question, your Honor, the invitee situation, I have been unable to find any cases where in a situation such as this, the employee of a third party crawling under the couplers or going between cars, has ever been held to be an invitee. The cases such as at street crossings, customary and usual places, and so on and so forth, there certainly are cases on that particular phase, but on this phase it is our position that the plaintiff in this case did not have express or implied permission to crawl under the cars at the location where he did.

We have numerous other cases, but I believe the cases counsel has cited cover the situation.

The Court: As I remarked last night, it has been the definite announced policy of the Court of Appeals that in a case of doubt, a case of this kind should be submitted to the jury, so that if there is an appeal, the whole record will go up on all of the proof.

Of course, the motion for directed verdict has

a proper place in our procedures, and where I am convinced that the plaintiff hasn't made a case to go to the jury, I wouldn't hesitate to grant motions for direct verdict. I have granted them, but I grant them sparingly, and if there is any doubt about it, if there is any doubt in my mind, of course the common sense thing to do is to let the trial [596] go on, because I haven't time to sit down and, as Snuffy Smith would say, riddle out these rules in cases at this stage of the lawsuit. And under our rules, the motion for directed verdict, converted in to a motion N.O.V. if the verdict is for the plaintiff, may be renewed at any time within ten days after the trial.

I think that this is, to use Judge Clark's language a very narrow and close case so far as the railroad company is concerned. You have to bear in mind all the time that this suit is not against Addison Miller, but against the railroad company, and it is the burden of the plaintiff to show that the railroad company owed some duty to this minor which was breached by negligent conduct.

However, it seems to me that there is a distinction here, and my only problem at this time is to determine whether or not in this evidence presented by the plaintiff there is any substantial proof or inference that may reasonably be drawn from it that would sustain recovery, for it is for the jury to weigh the evidence and determine the credibility of the witnesses and to draw the inferences, so long as they are permissibly reasonable ones.

Now here, it seems to me, that even from the

proof without the contract in evidence, we have a situation where there is an arrangement of some sort, a business arrangement, between the railroad company and this Addison [597] Miller Company. To do what? To do work that is very vital and essentially necessary to the conduct of the railroad's business. The railroad company, obviously, has a very direct and vital interest in the icing of its refrigerator cars, because freight and perishables could not be shipped without icing them.

Now, rather than doing that on their own premises themselves, they have turned that task over to someone else, and assuming, as I think I should here, that the Addison Miller Company is not an agent of the railroad company, but an independent contractor, there is a very definite mutuality of interest in the conduct of this icing operation, and I think that covers not only the matter of putting the ice and the salt into the compartments of the "reefers," but also anything that is reasonably necessary to the conduct of that operation. And I think that the dumping of the slush ice from the pit and the disposal of the salt sacks from the salt cars, the unloading of the salt from the salt cars and putting it into the salt pit, are just as much a part of the operation as the actual putting of the ice and salt into the compartments of the cars.

And what we have here is proof that customarily this space north of Track 13 was used by Addison Miller for dumping salt sacks; that when they put salt into the pit, they dumped the sacks over here in this space that was [598] commonly used by

the railroad company, also, for the disposal of refuse, and that there the sacks were dumped and that would necessitate crossing that track in some manner or other.

So that I think the jury would have a right to infer that when the foreman directed the minor, as they could believe, to dump this slush ice across the track, that he was directed to dump it in the place where the salt sacks were customarily placed and where the railroad company knew or certainly should have known that that part of the premises was used for the icing operation, and it seems to me that we have here a situation where there could be a reasonable inference that the railroad company at least permitted the use of this area beyond Track 13 and the crossing of Track 13 for the purpose of disposal of refuse by the Addison Miller Company. And then if the minor went upon it in the exercise of that permissive use, he would be an invitee and not a mere licensee.

And, also, it seems to me that the matter of contributory negligence, under the circumstances here, is one for the jury, because you would have a different question, certainly, I think, if of his own volition he elected to go under the couplings of standing cars to dispose of this slush ice; but we must remember that the testimony here is that never when cars were standing on that track, [599] according to the testimony of some of the witnesses, never were floating cars jammed into them in the manner that was done here on the 17th of July, so that these people who were working there, accord-

ing to their version of it, had good reason to believe that they were safe; that those cars were frozen even without a blue light; that there would be no violent switching operation while those cars were standing there and while salt was being unloaded from one of them. So that when this boy comes out and sees the platform there with salt being moved from one of the boxcars, isn't it an inference that the jury could draw that he had reason to believe that he could safely go under the car, as he had been ordered to do? And we should scarcely expect a 17 year old boy to quarrel or question a mature foreman and say, "No, you are wrong, I am going to do this in a different way. I am not going to do it the way you seem to have ordered me to because I have either got to go through or take an impractical course around the end of a long car or under a platform where salt is being unloaded."

At any rate, I think at this stage the case should go on, and the motion will be denied.

Bring in the jury, then.

(Whereupon, the following proceedings were had in the presence of the jury:) [600]

The Court: All right, proceed.

Mr. Cashatt: May I proceed, your Honor?

The Court: Yes.

Mr. Cashatt: Mr. Thomsen, will you please come forward and be sworn?

A. C. THOMSEN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Will you state your name, please? A. A. C. Thomsen.

Q. And what is your occupation?

A. District Claim Agent.

Q. For what company?

A. The Northern Pacific Railway Company.

Q. Where do you live? A. At Spokane.

Q. And is your office in Spokane, also?

A. At 805 Old National Bank Building.

Q. How long, Mr. Thomsen, have you had this position of District Claim man for the Northern Pacific Railway? A. 14 years.

Q. How long have you been in Spokane? [601]

A. About 9 years.

Q. Mr. Thomsen, on June 9, 1954, at about 4 p.m., did you talk with Ray "Idaho" Davis on the front porch of his home at East 3511 Garnet Street, Spokane, Washington?

A. Yes, I did.

Q. At that time, Mr. Thomsen, did Mr. Davis state to you: "I was in the salt mine?"

A. Yes, he did.

Q. Did you ask him what he meant by "salt mine?" A. I did.

Q. And what did he say?

A. He said that is the salt pit where the salt is stored.

(Testimony of A. C. Thomsen.)

Q. At that time, did you ask him if he, on the night of this accident, July 17, 1952, right at the time just before the accident happened, was unloading salt from a boxcar?

A. I asked that question, yes, sir.

Q. What did he say? A. He said "no."

Q. At that time, did you ask him if there was any car of salt on the track by the salt house for unloading? A. He said he knew of none.

Mr. Cashatt: You may inquire. [602]

Cross Examination

Q. (By Mr. Etter): You have been the Claim Agent for 14 years, you say, Mr. Thomsen?

A. For the Northern Pacific, yes, sir.

Q. That is here in this area?

A. Nine years here and the balance in Butte, Montana.

Q. The balance in Butte, Montana?

A. Yes, sir.

Q. So I assume that your district, you have been here 9 years as District Claim Agent?

A. Yes, at Spokane.

Q. That is correct. You, in that period of time, have taken a lot of statements from witnesses for the purpose of investigating railroad accidents?

A. Yes, I have.

Q. Is that correct, sir? A. Yes.

Q. As a matter of fact, in this particular case you secured numerous statements immediately after the accident and subsequent thereto from witnesses

(Testimony of A. C. Thomsen.)

who were there or who purported to know something in connection with the accident?

A. Yes, I delivered those over to you.

Q. Those were delivered to us, isn't that correct? [603]

A. I think there are about 14, Mr. Etter.

Q. You took about 14 statements. All of these were written statements, were they not?

A. That's right, typewritten.

Q. Did you talk to Idaho Davis prior to June the 10th of 1954?

A. I talked to him on the phone on June the 3rd, 1954.

Q. June 3rd? A. Yes, sir.

Q. Do you recall what that conversation was about?

A. Yes, I called him and asked him if I could come out to see him, and he gave me the address that he was at. And then he volunteered to come down to see me the following day at 10 o'clock, which would have been the 4th of June.

Q. I see. He didn't come down?

A. No, he didn't show that day.

Q. And then you went out to see him on the 10th? A. The 9th.

Q. The 9th? A. Yes.

Q. After calling him? A. Yes.

Q. You called him first and went out to talk with him?

A. No, not on the 9th; I just went out and talked to him. [604]

(Testimony of A. C. Thomsen.)

Q. He said he had been working in the salt mine? A. Yes.

Q. What was the full extent of your conversation, as you remember it?

A. When I arrived, he came to the front door and stood in the door as we talked. I stood on the porch, and he immediately asked me, he said, "Are you the man who called me on the phone?" and I told him that I was. Then he went on to explain that he had come to my office on Saturday, the 5th of June, and that the office was closed, and I told him that that would be true on a Saturday.

Q. Well, now, back on August the 7th of 1952, right shortly after this accident happened, you knew, as a matter of fact, that one of the witnesses had stated that the path between the cars and the icing dock couldn't be taken for the purpose of dumping the slush because of the platform that was observed there between the salt mine, so-called, and the salt cars, didn't you?

A. That was in the second statement I took from Allan Maine, I believe.

Q. That is correct, but it was taken on the 7th day of August of 1952?

A. At his home, yes, sir.

Q. At his home. And he told you that the path was more or [605] less blocked by a low, removable platform from the dock to the salt car, or rather between the salt car and the salt house located on the dock; isn't that correct?

A. That is correct.

(Testimony of A. C. Thomsen.)

Q. So you knew back in 1952, on August the 7th of 1952, about the possibility, at least, from the statement of this witness of the salt loading and unloading operations, is that correct?

A. I knew that Allan Maine had said that in his statement, yes, sir.

Q. He had said that in his statement. Well, at that time did you go out and make any inquiry of Idaho Davis?

A. No, I was unable to find Idaho Davis, and I dropped the search.

Q. You were unable to find him?

A. I made one or more attempts to reach him.

Q. I see. And you dropped the search from August the 7th, somewhere about there, 1952, until June the 1st of 1954?

A. That's right.

Q. Was he hard to find this time, Mr. Thomsen?

A. Well, he was. I didn't know where he lived and I tried a number of telephone calls, and finally on the 3rd a man came to the phone at a Hudson number, I forget the number, and called him to the phone. That was [606] the first contact I had with him.

Q. Well, you knew at the time the man that you were looking for, you knew you were looking for Ray Idaho Davis, isn't that correct?

A. Yes, I knew him as Idaho Davis.

Q. You knew him as Idaho?

A. Yes, Allan Maine had given me his name.

Q. Allan Maine had told you? A. Yes.

(Testimony of A. C. Thomsen.)

Q. You knew he was a football player at Rogers High School?

A. I think he told me that they were friends, yes.

Q. And that he went to Rogers High School?

A. I believe he said he was an athlete, yes, sir.

Q. And he was in Rogers High School in 1952, isn't that right?

A. Well, I didn't know that.

Q. Well, did you ever go out to Rogers High School? A. No, I didn't.

Q. To talk with him? A. Never did.

Q. You made no further inquiry then about him, is that right?

A. That's right, until in June of this year.

Q. Well, did you ever notice in the newspapers during the [607] fall of 1952 or '53 anything about Idaho Davis being an all-city halfback or playing on the football team?

A. I'm afraid I didn't, I don't follow the local football scene very closely.

Q. So you didn't know anything about him except he was Idaho Davis, you weren't able to find him? A. That's right.

Q. And over a period of two years, the first time that you have been able to make this contact is this last time in the fore part of June of this year?

A. Talked with him on the phone on the 3rd of June.

Q. On the 3rd? A. Yes.

Q. And, as I say, though, you knew about this

(Testimony of A. C. Thomsen.)

statement and had this information on August 7, 1952? A. That's right.

Q. Isn't that correct?

A. That is correct.

Q. All right. Now, Mr. Thomsen, you went out and talked with him, but you secured, as you have indicated to this jury, about 14 written statements, which you secured from practically every available witness, I assume, that you could find in the pursuit of your duties for your company; isn't that correct? A. I beg your pardon? [608]

Q. You took statements from everybody that you could find that knew anything about this case?

A. That's right.

Q. About 14 of them in all, isn't that correct?

A. That's right.

Q. Why was it that you didn't get a written statement from Idaho Davis?

A. Well, I was just probably a little negligent in not getting it. Allan Maine had told me that he was not an eye witness, I knew that much.

Q. Well, is that your explanation to the jury why you are here testifying as to an oral conversation without a statement, that you were negligent?

A. I may have been.

Q. You have been the District Claim Agent, as you say, for 9 years and 5 years you have been in Montana, and you go out and investigate this case and it was one of the most serious injuries you have ever handled, isn't it, Mr. Thomsen?

(Testimony of A. C. Thomsen.)

Mr. Cashatt: I object to that question, your Honor.

The Court: I will sustain the objection to that.

Q. (By Mr. Etter): I will ask you whether or not you didn't—

The Court: You can ask him if it was an important case. [609]

Q. (By Mr. Etter): I will ask you whether or not this is an important case?

A. I would regard it such, yes.

Q. Why?

A. Because of the severity of the injuries.

Q. And you say you got these statements, but you didn't get a written statement from Idaho Davis?

A. That's right. I didn't follow it up.

Q. Didn't follow it up. And you are testifying here as to your recollection of an oral conversation that you had with him?

A. That's right.

Q. Are you prepared to say as an absolute certainty that Idaho Davis told you he did not and was not and had not unloaded salt?

A. I surely am.

Q. Beg your pardon?

A. That is what he said.

Q. That is what he said? A. Yes, sir.

Q. And that was on June the 9th?

A. June the 9th.

Q. Now I have asked you whether you got a statement; did you ask him for a written statement? A. No, I didn't. [610]

(Testimony of A. C. Thomsen.)

Q. You did not?

A. I didn't go out there with that intention.

Q. Didn't you ask him then to provide you with one, or did you state to him that you would come back and have him sign one?

A. No, I didn't even have my typewriter with me, Mr. Etter.

Q. Didn't have your typewriter? A. No.

Q. You stated that this was a serious case because of the severity of the injuries, isn't that correct? A. That's right.

Q. You were likewise in your investigation, or were you, attempting to determine the responsibility?

A. No, I was just to get the facts. Those are my duties, Mr. Etter, just to get the facts.

Q. For your employer?

A. For my employers in St. Paul, Minnesota.

Q. And the facts that you were trying to get, of course, you were interested in determining how the accident happened?

A. That was the sole purpose of my inquiry.

Q. That was the sole purpose? A. Yes.

Q. The sole purpose of inquiring into those facts would be [611] to determine whether there was any liability of the railroad company or of the party who was injured or of anybody else, isn't that right?

A. Well, I don't determine liability questions.

Q. Yes, you don't determine them, but I mean you try to get the facts from which it can be determined?

(Testimony of A. C. Thomsen.)

A. Yes, I try to get the facts from the various witnesses, yes, sir.

Q. Beg your pardon?

A. I try to get the facts from the various witnesses.

Q. And at the time in 1952, did you feel that it was important to get the facts with regard to whether or not there was a salt unloading operation being carried on?

A. No, I didn't attach much importance to that, I just figured that this young man was so young that he probably was confused about that.

Q. In other words, you didn't attach any importance to it?

A. Not from that particular witness, no.

Q. From Mr. Maine, you mean?

A. Yes, from Mr. Maine.

Q. And you didn't attach any importance to it until June of this year, is that it?

A. Not until after Mr. Stintzi's deposition had been taken when he raised that question.

Q. When he raised the question? [612]

A. Yes.

Q. You don't think, or do you think that Mr. Maine had raised it at the time in his statement?

A. I beg pardon?

Q. Did you feel that Mr. Maine had raised a problem or a question of responsibility of liability?

A. No, I thought due to his extreme youth, that he probably was confused about the operation down there.

(Testimony of A. C. Thomsen.)

Q. And then you felt that Mr. Stintzi was also confused about it?

A. Well, at that time I had made further checkup and had determined that there was no salt car there.

Q. You what?

A. I had determined from the company's record that there was no salt car there that day.

Q. When did they tell you that?

A. Well, I checked it from the records.

Q. When, though? A. In '52.

Q. In '52? A. Yes.

Q. And then on April the 2nd when Mr. Stintzi's deposition was taken, there was a further statement by Mr. Stintzi about the salt operation, is that right? A. Yes, yes. [613]

Q. I mean April of '54?

A. Yes, he elaborated on it then.

Q. And two months later was the first time that you made any inquiry for Idaho Davis?

A. Well, that was occasioned by the fact, Mr. Etter, that the case had been set for trial.

Q. I see.

A. I had been notified by Mr. McKevitt and Mr. Cashatt that the case was set for trial. That was done during my absence, I was in California at the time.

Q. Well, now, did you feel that it was important to talk with Idaho Davis on June the 1st, if you had made an inspection of the railroad cars and had come to the conclusion in '52 that the state-

(Testimony of A. C. Thomsen.)

ment of Allan Maine was made by a confused youngster? Was there any point, did you feel, in talking to Idaho Davis?

A. Yes, I had two purposes in talking to him.

Q. What were they, both of them?

A. One was to check on his availability for the trial. I was doing that as a routine matter.

Q. All right?

A. And, second, I wanted to find out where he was when the accident occurred.

Q. His availability for trial, was that for the defendant, is that it? [614]

A. Well, in case they should have needed him. They didn't.

Q. Was there any subpoena issued for him at that time?

A. I believe there has been none issued.

Q. I see. But you knew, and I guess you have indicated that you had checked this question out in 1952?

A. Yes, sir.

Q. And did not become concerned with it until April of 1954?

A. Well, I became concerned about it when the case was set for trial, yes.

Q. I thought you said a minute ago it was Mr. Stintzi's deposition is when you became concerned with it.

A. Well, I had it in mind, yes.

Q. You had it in mind in April? A. Yes.

Q. And you went out and talked to this boy two months later? A. Yes.

(Testimony of A. C. Thomsen.)

Q. But did not get a statement?

A. No written statement, no, sir.

Q. Nor did you ask for one?

A. I didn't ask for one, no, sir.

Mr. Etter: That is all.

The Court: Any other questions? [615]

Mr. Cashatt: That is all, Mr. Thomsen.

The Court: That is all, then.

(Witness excused.)

Mr. Cashatt: Mr. Corrigan.

FRANCIS T. CORRIGAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name, sir, is Frank Corrigan, is it? A. Yes, sir.

Q. And where do you reside?

A. 6300 East First in the Valley.

Q. How long, Mr. Corrigan, have you lived in Spokane? A. 34 years.

Q. And married and have a family?

A. Yes. I have a married daughter in California.

Mr. McKevitt: Keep your voice up, Frank, please.

Q. (By Mr. Cashatt): What is your occupation?

A. I am the general yardmaster for the Spokane-Yardley yard for the Northern Pacific.

Q. General yardmaster?

(Testimony of Francis T. Corrigan.)

A. General yardmaster, yes. [616]

Q. What is a general yardmaster?

A. Well, the general direction of the movement of all cars and trains are under my supervision while they are inside of the yard limit borders, which extends from Seventh Avenue to about Argonne Road east of Spokane.

Q. How long have you held this position as general yardmaster? A. A little over 3 years.

Q. How long have you been employed by the Northern Pacific Railroad?

A. 34 years here and some previous time on the Coast.

Q. When you say "here," you mean in Spokane, is that right? A. Yes.

Q. Just tell us what other jobs and positions you have had.

A. Well, I first came here and was employed as a switchman from May, 1920 until May, 1936. I was then promoted to yardmaster. I served as a yardmaster for 5 years. I was then made assistant general yardmaster, I served for about 10 years, and I was then promoted to general yardmaster, which I have held for a little over the last 3 years.

Q. Now what hours, Mr. Corrigan, do you work?

A. Well, I am what you call a 24-hour man, I am subject to [617] call at any time. But my office hours are ordinarily from about 8 a.m. to around about 5 p.m.

Q. And where is your office?

A. Out at the Yardley yard.

(Testimony of Francis T. Corrigan.)

The Clerk: I have marked Defendant's Exhibit 37.

The Court: Is it 37?

The Clerk: 37.

The Court: It hasn't been admitted yet.

Mr. Cashatt: I was just going to ask counsel.

The Court: Well, all right.

Mr. MacGillivray: We have no objection.

Mr. Cashatt: I am offering Exhibit 37.

The Court: It will be admitted in evidence, then. Go ahead.

Is that 37, did you say?

The Clerk: Yes, your Honor.

The Court: All right.

(Whereupon, an aerial photograph was admitted in evidence as Defendant's Exhibit No. 37.)

Q. (By Mr. Cashatt): Mr. Corrigan, would you please step down here, sir? [618]

(Witness goes to blackboard.)

Mr. Corrigan, Exhibit No. 37 has been admitted in evidence and it is an aerial photograph of the Yardley yards of the Northern Pacific Railway. Will you look at it, Mr. Corrigan, and see if you can orient yourself as to what is shown as to the directions? Would this be north (indicating)?

A. Yes.

Q. And south?

A. South.

Q. And west?

A. West.

Q. And east?

A. That's right.

(Testimony of Francis T. Corrigan.)

Q. And do you recognize on Exhibit 37 where your office would be?

A. Let me see, right about in here (indicating).

Mr. McKevitt: Designate by a reference.

Q. (By Mr. Cashatt): You are pointing now, Mr. Corrigan—

A. To the yard office.

Q. To the yard office, which is located on—oh, it would be toward the southwest corner of the map, in that general area?

A. That's right.

Mr. McKevitt: Mr. MacGillivray makes a good [619] suggestion, Leo, that you put East, West, North and South on there, will you?

Mr. Cashatt: Yes.

Mr. MacGillivray: Take a pen and just put the directions on there.

(Directions placed on Exhibit 37 by Mr. Cashatt.)

Mr. MacGillivray: I might make the same suggestion, your Honor, on all of these exhibits, that during the recess we put the directions on them.

Mr. McKevitt: That is agreeable.

The Court: Do that some other time.

Mr. MacGillivray: During the recess.

The Court: Not interrupt. May we not assume, unless the contrary is shown, that on all of the maps and diagrams, up is north, left is west, and so on? I used to do a little surveying when I was in high school so I know a little bit about that.

Mr. McKevitt: I know if I face to the north, then that the west is on my left.

The Court: Go ahead.

(Testimony of Francis T. Corrigan.)

Q. (By Mr. Cashatt): Mr. Corrigan, between what area, streets, does your yard run? Tell us about the street, what would be the west end of your yard.

Mr. McKevitt: Stand so his Honor and all the jurors can see you. [620]

A. Havana Street would be on the west end; what we call Hardesty Road cuts across about one-eighth of a mile from the east end, from the extreme east end of the yard. Now this is not the yard limits, this is the actual yard I am speaking about.

Q. (By Mr. Cashatt): The actual yard?

A. Yes.

Q. And in length, Mr. Corrigan, from say Havana, which you mentioned, on this end to the designation you have given us on the east, do you know approximately how far that is in between?

A. A little bit over a mile, just a little over a mile.

Q. And on Exhibit 37, Mr. Corrigan, can you point out how many tracks, tell us how many tracks you have, and take the pointer and generally show where they are? A. Well, we start—

Q. Stand back so the jury can see.

A. We start right here (indicating)—

Q. That is on the south side?

A. Which is the east—first, I will go back. This is the cannery spur (indicating), this is the extreme south track in that yard, and it is an industrial spur. Then we have the eastbound main, then the westbound main, and then we start in number-

(Testimony of Francis T. Corrigan.)

ing our tracks from Track No. 1 and go north. We have 13 trainyard tracks, [621] extending from No. 1 to 13, inclusive. Then we have 4 cleaning tracks, extending from 14 to 18, inclusive, with a short track located just north of Track 14 that only holds about 11 cars. That is known as Track 15. Clean stockcars and sand them and disinfect them, and so on and so forth. We have no Track 19; Track 20, 21, 22, 23, 24 and 25 (indicating) are what we call the repair tracks. 27 and 28 are shop tracks. Then we get over into Track 29, 30, and so on, on up to and including Track 41, and those are used mostly for company business, the engines go in and out of the round house. We have a track where we spot coal to put up on the coal dock and another track where the empties come down. Back of the round house we have what we call the machine shop tracks. Then clear over to Track 41, which is the last track in this particular yard, is the track where we put up coal for the stationary boiler.

Q. And Track 43, do you know where that is?

A. Track 43 starts over here (indicating). Now this is what we call the "pocket yard," and it extends from Track 42 over to and including Track 55.

Q. Now point out the round house, will you, Mr. Corrigan, if you can recognize it there?

A. This is the round house right down around here. You can see the turn-table pit in the center.

Q. From this I know the tracks aren't distinct,

(Testimony of Francis T. Corrigan.)

and so on, but can you designate Track 13, if you can identify it from that picture? Take a look.

A. Well, I would say this is just about Track 13 right along here (indicating). Yes, that is just about 13 right in there.

Q. On the picture, Mr. Corrigan, I don't believe the detail is enough to identify the ice dock, is that right?

A. Well, no, it doesn't. That dark line along here possibly is the shed on top of the ice dock, for it just extends for a short distance in the middle of the dock, but I can't see the ice dock on there.

Q. In looking at Exhibit 37, Mr. Corrigan, the things we see sitting along here, the little lines with spaces in between, can you tell what those are?

A. Well, they are supposed to be cars, I guess.

Q. How many cars, Mr. Corrigan, go through and in and out of that yard in an average month?

A. Well, normally we handle about 55 to 56,000 cars a month in and out. By in and out, I mean we get credit for them twice—once coming in, once going out—which makes about 56, 57,000. It all depends on how business is.

Q. And can you tell us, Mr. Corrigan, what would be the [623] average number of times that a car would be switched while it is in the yard?

A. Well, actually, some of these cars are handled as high as 6, 7, up to 8 times, between the time they arrive and the time they depart from the yard. Then others move right through with two handlings.

(Testimony of Francis T. Corrigan.)

Q. Mr. Corrigan, what about the switching operation on an average day, how many switch engines are at work in the yard?

A. Oh, our normal operation is 21 engines, which is 3 engines on each shift, around the clock.

Q. So on each shift there would be an average of 3 switch engines working, would there?

A. 7 switch engines.

Q. 7 switch engines?

A. 7 switch engines.

Q. Excuse me, you said 3 shifts. A. Yes.

Q. That was my fault. Now the crews on those switch engines consist of what?

A. There is a foreman, two helpers, an engineer and a fireman.

Q. And from whom do they take their orders?

A. From the assistant general yardmaster or from the assistant yardmaster under the assistant general [624] yardmaster, but the direct operation of the yard on that particular shift is governed by the assistant general yardmaster.

Q. Now your position is the general yardmaster?

A. That's right.

Q. Then on each shift do you have an assistant yardmaster?

A. I have an assistant general yardmaster under me on each shift. One goes to work at 7 in the morning and works until 3; another relieves him at 3 and works until 11; another man relieves him at 11 and works until 7 in the morning.

(Testimony of Francis T. Corrigan.)

Q. I believe you can be seated now, Mr. Corrigan.

Tell us now, Mr. Corrigan, just what the duties are of an assistant yardmaster.

A. Assistant general or the assistant?

Q. The assistant general.

A. The assistant general. Well, he is held responsible to me for the correct movement of all cars through the yard while he is on shift, for the spotting of the cars at the different industries, pulling cars from the different industries, putting bad order cars onto the repair tracks, the spotting of cars any place that it is necessary to put them in order to have any kind of service performed on them. He is directly responsible for that on his particular shift. [625]

Q. Say a yardmaster coming on shift at, say, 3 o'clock in the afternoon, is he given any information as to what cars are in the yard at that time?

A. Yes. We have a number of checkers, what we call yard clerks, that check every car in the respective yard and bring in these checks, these car numbers, on long lists and lay them down on the yardmaster's desk. The yardmaster going off shift, the assistant general yardmaster going off shift, makes out what is known as a turnover.

Mr. McKevitt: A what?

A. A turnover. That is made in a turnover book and it gives the yardmaster coming on duty a general idea of what is on each separate track in the yard. Then by picking up the lists that the clerks

(Testimony of Francis T. Corrigan.)

have brought in, he has a pretty good idea of the over-all picture of the yard as he goes to work at his respective time to go to work.

Q. Is that for the purpose, Mr. Corrigan, so that he will know and have the information where the cars are and on what tracks they are, and so on?

A. Oh, yes.

Q. And was such a record kept during the month of July, 1952? A. Oh, yes. [626]

Q. And is that a regular running record of the Northern Pacific Railway? A. Yes.

Q. Now, Mr. Corrigan, in the yard out there in switching, is it the custom to disengage cars from an engine and let them drift down a track? Is that done out there?

A. Oh, yes, that is the practice of switching. That is the conduct of switching, yes.

Q. And is that done in the day or evening?

A. Oh, yes.

Q. Is it done on each shift throughout the 24 hours? A. Yes.

Q. And when you are in the yard, do you hear any noise? A. Oh, yes.

Q. Tell us what general noise you hear around that yard from time to time?

A. Well, naturally, in switching cars, we'll say that there is a cut of cars in on a track and the engine working on the lead cuts off, oh, maybe 1, 2, 3, 4 cars and let them roll in and bump against cars that are already in on the track, and, naturally, you can imagine steel going against steel, when the

(Testimony of Francis T. Corrigan.)

draw bars hit against each other, it makes quite a bit of noise. Then when trains are pulling in and out of the yard, if the train happens to have a steam engine on it, the [627] exhaust from the steam engines, they make considerable noise, and so on and so forth.

The Court: I think we should take a recess now. The Court has been in session since 9:30.

I think I should explain to you members of the jury that when I excused you last night until 9:30, I knew that we would have some argument on law questions. I had hoped that we would get through with it last night, but that proved to be impossible, so that nobody was late in keeping you waiting this morning; we were just working out here while you were waiting in there. It was unavoidable.

Court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

Q. (By Mr. Cashatt): Mr. Corrigan, the practice of uncoupling cars and freight cars in the switch yards and letting them drift down the track, is that a common practice in railroad yards throughout the country?

A. Oh, yes, that is the standard practice for switching.

Q. And have you worked for other railroads?

A. I have been around quite a bit.

Q. Which ones?

A. Well, this is the fourth time I have worked for the Northern Pacific; worked twice for the Great Northern; worked for the Union Pacific,

(Testimony of Francis T. Corrigan.)

Southern Pacific, [628] Santa Fe, Rock Island; worked for King Street Terminal over in Seattle and worked for a couple of construction outfits.

Q. And was that a common practice, this uncoupling of cars and letting them drift down the tracks in a switch yard with those roads that you worked with?

Mr. MacGillivray: Just a moment. Objected to as immaterial. We know in this case what the Northern Pacific did and that is all that is material.

The Court: It is material only to show the common custom and practice. It will be permitted for that purpose.

The Witness: I may answer?

The Court: Yes.

A. Oh, yes, that is the standard practice of switching cars. In that line, I would say in yards where they have a little hill, they even furnish the fourth man on a crew with a club to ride cars so they can let them keep rolling.

Q. Now, Mr. Corrigan, you are familiar with where the Addison Miller people operated the ice dock in the yards? A. Yes.

Q. And is there a phone between the yard office and the Addison Miller dock?

A. Yes, company phone. [629]

Q. Company phone? A. Yes.

Q. That is a regular Bell telephone?

A. Yes.

Q. Was there in July, 1952?

A. Oh, yes.

(Testimony of Francis T. Corrigan.)

Q. And were you familiar, Mr. Corrigan, in July, 1952 with the procedure in Northern Pacific contacting Addison Miller and Addison Miller contacting Northern Pacific in regard to the work that was to be done by them? Were you familiar with that procedure?

A. Yes, I was.

Q. Will you tell us, Mr. Corrigan, what the procedure was in July, 1952 when cars would arrive at the yards to be iced?

A. Well, of all trains coming into the yard, we have what we call a wired list which is taken by the operator on duty at Yardley. The trains coming from Pasco, the conductor on the train leaving Pasco gets a check of his train and makes a copy of it on a soft list, what we call a soft list, and drops it off to the operator at Connell. The operator at Connell wires it to the operator at Yardley; that is, the telegraph operator. The telegraph operator at Yardley makes three copies of this list. He gives one to the assistant general [630] yardmaster on duty, he gives one to the ice foreman on duty, and he hangs one up on a hook for the special agent on duty. And on this list the conductor shows the number, the initial, the number of the car, the gross weight of the car and contents, the contents, and the final destination of the car. Also, if there are any refrigerator cars, he makes a notation on the side of the list showing what kind of service those cars require.

Q. You mentioned ice foreman, what about that?

(Testimony of Francis T. Corrigan.)

A. We have on duty out at Yardley an ice foreman that has charge and has the responsibility for seeing that all perishable shipments going through the yard, and also I will say laying around the yard spotted at different places, are kept in such a condition that they will not spoil. Now the general foreman works from 8 a.m. until 4 p.m.; he has an assistant foreman that relieves him at 4 and works until 12 midnight; and there is another assistant foreman works from 12 midnight until 8 a.m. in the morning. So when I speak of ice foreman, that is who I refer to.

Q. And those are the Northern Pacific employees, are they? A. Yes.

Q. And then when the information you have told us about, a train coming in with refrigerator cars, when that [631] arrives or before it arrives, what does the ice foreman do?

A. The ice foreman will check this list over, decide what kind of service these cars require. He then goes to the yardmaster on duty and asks the yardmaster how he is going to handle this train, whether he is going to head it in a trainyard track or pick it up and set it over, set the icers over to the dock, or whether he is going to head this train right in at the dock and let them start icing. He then calls up Addison Miller and tells Addison Miller how many perishable loads he has coming in on this train, what the service requirements are, and how the yardmaster is going to handle it.

(Testimony of Francis T. Corrigan.)

Q. And is that done before the train actually arrives? A. Oh, yes, yes.

Q. And then is it the assistant yardmaster on duty, is he the one that gives the direction to put the train on either Track 12 or Track 13?

A. Oh, yes, yes, he is the boss in the yard. He is the bossman.

Q. Then after the icing, do you know, Mr. Corrigan, how it is handled after the icing operation is completed?

A. Well, as soon as the icing operations are completed, the ice foreman ordinarily has an assistant down on the dock to measure the amount of ice and salt that is used [632] to service each one of these cars. There also is a representative from Addison Miller up on the dock, and when they have agreed that they are all through servicing these cars, then they notify the ice foreman, the ice foreman notifies the yardmaster that they are all through with the cars, and the yardmaster handles them from then on.

Q. Mr. Corrigan, what is the procedure as to handling salt cars that come in? A. Well—

Q. In 1952, July, 1952, what procedure did you follow?

A. We have a salt house underneath the west end of the icing platform. The salt comes in in boxcars and, at the convenience of the yardmaster, this boxcar loaded with salt is spotted opposite the door to the salt house, and the Addison Miller Company

(Testimony of Francis T. Corrigan.)

then has the responsibility for unloading this salt out of the car into the salt house.

Q. Is the assistant yardmaster the one that gives the order to spot that car?

A. The assistant general yardmaster, yes.

Q. And then when unloading of the salt is completed, what is the procedure to remove the car?

A. When the car has been unloaded, they notify the ice foreman, the ice foreman notifies the yardmaster that [633] the salt is all unloaded, and the yardmaster removes the car at his convenience.

Q. Do you know, Mr. Corrigan, if there is a regular permanent record kept by the Northern Pacific Railroad of the salt cars when they come in the yards and when they are unloaded, and so on?

A. Oh, yes.

Q. And that is a regular Northern Pacific running record, is that right?

A. Oh, yes, yes.

Q. And is there also a record kept by the Northern Pacific of refrigerator cars or refrigerator trains, fruit trains, that come into the yards and are iced?

A. Oh, yes.

Q. Does that record show the time of arrival and the time of the completion of the icing operation, and so on?

A. Yes, it does.

Q. And the time of departure?

A. Yes, it does.

Q. And is that record a regular permanent running record of the Northern Pacific Railway Company?

A. Oh, yes.

(Testimony of Francis T. Corrigan.)

Q. And where are those records kept?

A. We have a copy of them out at Yardley. Oh, they are kept for years back. [634]

Q. But your copy is kept at Yardley, Washington?

A. Yes. Well, there is some copies kept at Yardley and there is some copies are sent down to the freight house and they are kept by the agent's office down at the freight house.

Q. And those records that we have talked about, Mr. Corrigan, are they made up under the supervision of the chief clerk at Yardley, Washington?

A. Well, now, you mean the icing?

Q. Yes?

A. No, I would say that they are made up under the ice foreman, under the supervision of the ice foreman.

Q. But all of the records made at Yardley concerning the movement of cars at that location, are they made under the supervision of the chief clerk?

A. Oh, yes, of the movement of the cars, yes.

Q. Mr. Corrigan, I don't believe you were at Yardley, Washington on July 17, 1952?

A. No, I wasn't.

Q. In the evening?

A. No, I wasn't, no.

Q. You had been there during the day, had you, sir?

A. No, no, I happened to be on my vacation at that time.

Q. I see. And, Mr. Corrigan, what was the prac-

(Testimony of Francis T. Corrigan.)

tice in July, 1952 up to July 17, 1952, as far as the use of blue lights by Addison Miller Company?

A. Well, at the time cars are spotted down at the ice dock, when Addison Miller's crew gets ready to work on those cars, they turn on what are known as blue lights at both ends of the dock.

Q. When you say both ends, that is the west end and the east end, is that right? A. Yes, yes.

Q. What kind of lights, Mr. Corrigan, are those?

A. At that time, there were electric lanterns—electric lights, I should say—with blue lenses or blue globes in them at each end of the dock on Track 12 and also on 13.

Q. And what was the reason or the purpose for Addison Miller turning on blue lights, say at the west end?

A. That is to signify to the men working around the yard that there are men working under, around or between cars, and that these cars are not to be coupled into or moved.

Q. And, Mr. Corrigan, during all the time that you were at the Yardley yards before July 17, 1952, did you ever see any Addison Miller employees dumping slush ice? A. No, I never did.

Q. Did you ever see any Addison Miller employees crawling under the couplers of Northern Pacific cars on either [636] Track 12 or Track 13?

A. No, I never did.

Mr. Cashatt: You may inquire.

Cross Examination

Q. (By Mr. MacGillivray): Mr. Corrigan, I un-

(Testimony of Francis T. Corrigan.)

derstand that at the yard office you have an ice foreman and an assistant ice foreman?

A. Yes. Two assistant ice foremen.

Q. Two assistants? A. Yes.

Q. And their duties, in part, are to determine just how much ice is used by Addison Miller in the icing of Northern Pacific cars? A. Yes.

Q. I presume the reason for that is that Northern Pacific pays Addison Miller perhaps per ton for ice used?

A. Well, really, that is out of my line. I suppose they do, I don't know.

Q. Yes. And does the ice foreman and his assistants keep track of the amount of salt used in the icing operations? A. Yes.

Q. Is that Addison Miller salt or is that Northern Pacific salt? [637]

A. I couldn't say who pays for it, I wouldn't say that.

Q. Then I understand, Mr. Corrigan, that frequently the Northern Pacific has an assistant ice foreman actually and physically down on the ice dock to measure the amount of salt and the amount of ice being used? A. At times, oh, yes.

Q. Yes. So I take it, Mr. Corrigan, from that practice that the Northern Pacific has a very vital and direct interest in the icing operations of Addison Miller Company?

Q. In what kind of operations, please?

Q. Icing operations?

A. Oh, yes, I imagine they have.

(Testimony of Francis T. Corrigan.)

Q. Well, you know they have?

A. Yes, you bet.

Q. Then you made the statement, Mr. Corrigan, that "We have a salt house under the salt dock."

A. Well, maybe I should clarify that and say there is a salt house.

Q. Well, that property belongs to the Northern Pacific, does it not?

A. I think it does, yes.

Q. The salt house, the icing dock, and the premises surrounding it?

A. I think the Northern Pacific owns it and I think it [638] leases it out or something.

Q. Yes. When you were an assistant yardmaster, did one of your duties entail going down on the ice dock?

A. I can't understand you, Mr. MacGillivray.

Q. When you were an assistant yardmaster——

A. Yes?

Q. Or an assistant general yardmaster, did one of your duties entail your going down on the icing dock from time to time? A. No, no.

Q. Have you ever been down on the icing dock?

A. Oh, yes, I have been down there.

Q. What is the length of that icing dock, approximately?

A. Well, it will hold 28 cars and we figure the over-all length of a car is 45 feet, that is, refrigerator, 45 feet, so multiply 28 by 45 and you have it.

(Testimony of Francis T. Corrigan.)

Q. That would be about 1,260 feet?

A. I guess, if that is what you get there, yes.

Q. In other words, that would be about four city blocks long, assuming a city block, as we consider, is about 300 feet in length?

A. About that, I guess.

Q. And on the top of that icing dock its full length are overhead white lights at approximately 40-foot intervals; do you know that? [639]

A. Yes, about that, I guess.

Q. On each side of the dock? A. Yes.

Q. Do you know how many lights there are?

A. No, I never counted them.

Q. Then, Mr. Corrigan, you say that you have checkers that check the cars in the yard at any given time? A. Yes.

Q. Are they working continuously around the clock? A. Yes.

Q. And they check car numbers? A. Yes.

Q. Do they check the exact location of each car and every car? A. Just on the track.

Q. Just on the track?

A. Not where it is located on the track, just on the track.

Q. So that an assistant yardmaster coming on at 7 o'clock, would he know at 8 o'clock where each and every car in that yard is?

A. Just give him a chance to pick up these checks and peruse them and he would have a pretty good idea on what tracks they are.

Q. He would have a general idea? [640]

(Testimony of Francis T. Corrigan.)

A. Yes.

Q. Now describe for us a cattle car, Mr. Corrigan. A. A cattle car?

Q. Yes.

Q. Well, they are ordinarily 40 feet long and, instead of being built solid, they are built with slats, which naturally leaves an opening so that the livestock loaded in them can get air.

Q. In other words, a cattle car is not a solid siding?

A. It is not a solid type, no.

Q. When did you return from vacation?

A. Let's see—well, I returned around about the end of the month. At that time, I got two weeks.

Q. And at the time you returned, there was quite an investigation underway concerning the accident of July 17th, do you recall?

Mr. Cashatt: I object to that, your Honor.

Mr. MacGillivray: It is preliminary, your Honor.

Mr. Cashatt: It is not material to the questions here.

The Court: I don't know just where it is leading. I will overrule the objection and see what develops.

Mr. MacGillivray: Read the question.

(The question was read.)

A. Well, nothing was said to me about it definitely. I [641] wasn't asked any questions or anything like that, if that is what you mean.

Q. I see. Well, after your return, Mr. Corrigan,

(Testimony of Francis T. Corrigan.)

did you find out the numbers of the two cars between which young Gerry Stintzi was injured?

A. No, I didn't.

Q. Did you ever see a picture of those two cars?

A. A picture of them?

Q. Yes? A. No, I never did.

Q. Never did? A. No.

Q. Do you know whether or not a picture of those two cars was taken the following day?

A. No, I don't know.

Q. Then, Mr. Corrigan, you say there is a company phone. By "company," you mean Northern Pacific phone between the icing dock and the yardmaster's office? A. Yes.

Q. And that phone is used quite frequently?

A. Whenever necessary.

Q. Whenever necessary. How do you make a connection between the yard office and the icing dock over that phone?

A. You just take the receiver off and I think it is one [642] long ring, one very long ring.

Q. Do you have a crank? A. A crank?

Q. Yes? A. A crank, yes.

Q. So that you can make a connection from the yard office to the icing dock within a matter of seconds on that phone?

A. If there is somebody there to answer it.

Q. And you stated that that phone is used for contact by Addison Miller to the Northern Pacific at the yard office and is used by the Northern Pacific to the Addison Miller? A. Yes.

(Testimony of Francis T. Corrigan.)

Q. And assuming, Mr. Corrigan, that the Northern Pacific at night after dark was drifting 14 unattended freight cars from the Old Main in front of the yard office down the lead onto Track 13 at a time when it was known that there were cars on Track 13 immediately opposite the icing dock and at a time that the white lights on the top of the icing dock were illuminated, it would have taken how long by use of that phone to advise the icing dock of the approach of those cars?

Mr. Cashatt: Just a minute. I object to that, your Honor, as not being a proper hypothetical question put to [643] this witness. He has testified that they could turn a crank.

The Court: Well, I will overrule the objection, if he feels he can make an answer.

Mr. MacGillivray: Do you remember the question, Mr. Corrigan?

A. Please repeat the question.

(The question was read.)

A. Well, had anyone done it, it would all depended how close someone was to the telephone to answer it.

Q. It would be a matter of seconds, wouldn't it?

A. And it would also depend how fast these cars were traveling.

Q. Well, the speed of the cars would have nothing to do with your telephone connection, would it, Mr. Corrigan?

A. It might.

Q. Why is that?

A. Might kick them pretty hard.

(Testimony of Francis T. Corrigan.)

Q. Pardon?

A. You might kick them pretty hard.

Q. Do they sometimes kick them pretty hard?

A. Yes, we do.

Q. Well, what I am getting at, Mr. Corrigan—

The Court: I think what he is asking is how long it would take to telephone from one place. That wouldn't depend [644] on how fast the cars were moving. He is just asking you how long it would take to telephone.

A. That is hard to answer because it is hard to tell whether anybody would be there to answer it or not.

Q. Well, assuming somebody was there on top of the ice dock in the immediate vicinity of that phone?

Mr. Cashatt: Now, your Honor, I believe that is too speculative, assuming and assuming and assuming.

Mr. Etter: I don't think it is.

A. I wouldn't want to set any definite time.

Q. (By Mr. MacGillivray): Well, it would be a matter of seconds, wouldn't it, Mr. Corrigan?

A. Well, I believe it would be a little bit longer than seconds.

Q. A matter of a minute?

A. Yes, two or three minutes.

Q. Two or three minutes?

A. A couple of minutes, anyway, I would say that.

Q. And, Mr. Corrigan, assuming that you turned

(Testimony of Francis T. Corrigan.)

14 cars loose in front of the yard office traveling three to four miles an hour, approximately what time would it take those cars drifting down the Old Main onto the lead onto Track 13 to reach the yard? A. To reach the what?

Q. The icing dock, I'm sorry? [645]

A. I think he is getting a little bit deep for me.

Q. Well, do you have any idea?

A. No, I would not say.

Q. It would take six or seven minutes, wouldn't it? A. I don't know.

Q. You don't know?

A. No, I don't think so.

Q. Mr. Corrigan, do you know how close the south rail of Track 13 is to the icing dock, the salt house? A. Well, I think it is standard clearance.

Q. What is standard clearance?

A. A little bit better than standard clearance.

Q. What is standard clearance?

A. Standard clearance is 8 feet from the center of the gage.

Q. Well, not the center of the gage, but from the south rail? This might help you, looking at Plaintiff's Exhibit No. 10, would you tell me the distance from that south rail to the edge of the salt house and the icing dock?

A. I would say 8 to 9 feet. No, from the south rail, you say?

Q. From the south rail?

A. Oh, yes. Oh, I would say pretty close to five feet, between four and five feet. [646]

(Testimony of Francis T. Corrigan.)

Q. Between four and five feet?

A. Yes.

Q. And with the freight car on Track 13, such as shown in Exhibit No. 10, what would be the distance from the south side of that freight car to the wall of the salt house and icing dock?

A. Oh, I would say—let's see—around a little bit short of four feet, about three feet.

Q. Some place—

A. A little bit better than three feet.

Q. Some place between three and four feet?

A. Yes.

Q. Then, Mr. Corrigan, from your long experience out there at the yard, you were familiar with the fact that immediately to the north of Track 13 and between Track 13 and Track 14 there is a common dumping ground?

A. Yes.

Q. And you are familiar with the fact that salt sacks used by Addison Miller in the icing operation, when emptied, were dumped at that common dumping ground?

Mr. Cashatt: Your Honor, I believe I will object to that. It is outside of the scope of the direct.

Mr. MacGillivray: He has testified to all of the operations in the yard.

The Court: I think he has pretty generally. I will [647] overrule the objection.

Mr. MacGillivray: Read the question back.

A. Well, it was always my understanding that the salt sacks were saved.

(Testimony of Francis T. Corrigan.)

Q. Have you never seen any salt sacks in that common dumping ground?

A. I can't say that I have. There is so much refuse there that I wouldn't say that I had, no.

Q. Mr. Corrigan—

A. Wait a minute, just a minute. Are they using paper or burlap?

Q. I was just going to ask you, aren't the salt sacks paper sacks?

A. I don't handle the sacks at all.

Q. Have you never seen them?

A. Yes, and all that I ever saw was in burlap bags.

Q. Well, handing you what is marked as Plaintiff's Exhibit 11, don't you see any salt sacks in that common dumping ground, a lot of them?

A. Well, if these are salt sacks, yes.

Q. Well, they are some kind of paper sacks, aren't they? A. Oh, yes.

Q. Yes.

A. But they could have come out of the cars off of 14, as far as I know. [648]

Q. Well, as I gather, then, you didn't know that Addison Miller used that common dumping ground for the dumping of empty paper salt sacks?

A. No, I didn't.

Q. And, Mr. Corrigan, you said that prior to July 17, 1952 you had a practice at the icing dock concerning the use of a blue light?

A. While they are icing cars?

Q. Yes? A. Oh, yes.

(Testimony of Francis T. Corrigan.)

Q. And that practice was supposed to be followed when anyone was working on or around, I believe, to use your words, that that signal was to be used and was to mean that men were working, Addison Miller men were working under, around and between Northern Pacific cars; is that correct?

A. I didn't say Addison Miller men, I said anybody.

Q. Well, including Addison Miller men?

A. I suppose so, yes.

Q. That practice has been changed since this tragedy of July 17, 1952, has it not?

Mr. Cashatt: Just a minute, I object to that, your Honor. I don't believe it is material what the situation is since.

The Court: Yes, I will sustain the objection.

Q. (By Mr. MacGillivray): Then, Mr. Corrigan, you say it is a common practice to let cars drift down the tracks at the Yardley yard unattended?

A. Oh, yes, that is the way we switch cars.

Q. Whether during the day or whether during the hours of darkness?

A. Yes, that doesn't make any difference.

Q. And does that statement apply to all of the tracks in the Yardley yard?

A. All the trainyard tracks.

Q. All the trainyard tracks? A. Yes.

Q. And prior to July 17, 1952, that practice had been in effect for how long? During all of your experience?

A. Ever since I have been here, yes.

(Testimony of Francis T. Corrigan.)

Q. And is there any difference in that custom and practice and was there any difference prior to July 17, 1952 on any of the trainyard tracks?

A. Not if there was no blue light or blue flag or anything displayed, no, the practice was the same.

Q. In other words, Mr. Corrigan, prior to July 17, 1952, Tracks 13 and 12 were treated by Northern Pacific employees at the yard the same as any other track, 1 to 12 and 14 to 18?

A. Oh, yes. [650]

Q. In other words, it did not enter into the scheme of things there at the Yardley yard prior to July 17, 1952 that between Tracks 13 and 12 and within four to five feet of both tracks, you had an icing dock on and around which men were working in icing operations?

Mr. McKevitt: That is objected to as argumentative in the form in which that question was put.

Mr. MacGillivray: I don't believe it was. Read it back.

The Court: Read the question.

(The question was read.)

The Court: I think that is argumentative. I will sustain the objection.

Q. (By Mr. MacGillivray): Well, did it enter into the considerations of the Northern Pacific employees at the Yardley yard that between Tracks 12 and 13 there was an icing dock on and around which men were continuously working?

Mr. McKevitt: Objected to as incompetent, ir-

(Testimony of Francis T. Corrigan.)

relevant and immaterial. Also object to the form of the question.

The Court: Overruled, he may answer.

A. Read the question again.

(The question was read.)

A. Men are not continuously working there.

Q. (By Mr. MacGillivray): Well, say frequently working?

A. I wouldn't say frequently working.

Q. Well, you tell us.

A. I would say that between 20 out of 24 hours in a day, there isn't anyone working around there.

Q. Well, does that apply in the months of July and August?

A. It just all depends how many fruit trains we happen to be running and how many perishable loads we happen to have at a particular time.

Q. Well, so we don't quibble, Mr. Corrigan, did those facts enter into consideration with the Great Northern employees so far as Tracks 12 and 13, changing the word "continuously" to "occasionally?"

Mr. McKevitt: Same general objection, your Honor, to this line of questioning, incompetent, irrelevant and immaterial.

The Court: Well, overruled.

Mr. MacGillivray: Do you understand the question now, Mr. Corrigan?

Mr. McKevitt: Two separate questions.

The Court: I am not sure that is a fair question of this witness unless he had control of the policy

(Testimony of Francis T. Corrigan.)

of the railroad company. He said that those tracks are treated the same as the other tracks. Now why it was done, of course, he wasn't the one to decide, was he? [652]

Mr. MacGillivray: Except he is the general yardmaster in full charge of the Yardley yard, your Honor.

Mr. McKevitt: Yes, but he has no authority to rebuild those tracks to that ice dock.

The Court: I permitted him to answer it. What was the answer?

A. I never answered it yet because he got to talking about the Great Northern, I think.

Mr. MacGillivray: Well, you know I am talking about the Northern Pacific.

A. Well, really, I don't get the gist of the question, to be honest with you.

Q. Well, you say you treated Tracks 12 and 13 the same as Tracks 1 and 2 or 17 and 18?

A. 7 and 8, did you say?

Q. 17 and 18.

A. No, don't include 17 or 18.

Q. Well, 1 and 2, then? A. Yes.

Q. What I am wondering, Mr. Corrigan, is prior to July 17, 1952, the date of this tragedy, did the Northern Pacific and its employees, including yourself, take into consideration from a safety standpoint the fact that between Tracks 12 and 13 there was an icing dock upon which employees of Addison Miller, during daytime [653] and during the night, were occasionally working?

(Testimony of Francis T. Corrigan.)

Mr. McKevitt: Same objection, if your Honor pleases.

The Court: Overruled.

A. You said on top of the dock?

Q. (By Mr. MacGillivray): On or around the dock?

A. It all depended on what was taking place down around that dock.

Q. All right. How long, Mr. Corrigan, in your experience out there have you been acquainted with the nature of the crew employed by Addison Miller on that icing dock?

A. Well, who do you include in that?

Q. The general laborers?

A. I don't know one from the other.

Q. Well, do you know, Mr. Corrigan, that it has been the practice of Addison Miller of employing as a good percentage of that crew high school kids?

A. Well, when they need men real bad, they just hire anybody that comes along, is my understanding.

Q. And that has been the practice ever since you have been in the yard?

A. It all depends on how bad they need men.

Mr. MacGillivray: That is all. [654]

Redirect Examination

Q. (By Mr. Cashatt): Mr. Corrigan, Mr. MacGillivray asked you how long it would take for you to get in touch with the Addison Miller dock over this phone if these cars were rolling down the

(Testimony of Francis T. Corrigan.)

Recross Examination

Q. (By Mr. MacGillivray): Mr. Corrigan, speaking of this blue light, you were speaking of prior to July 17, 1952, you made the remark that at that time "We had electric lanterns on the icing dock."

A. They had——

Mr. Cashatt: Just a minute. Did you finish your question?

Mr. MacGillivray: Yes.

Q. Is that correct?

A. There was a dividing time in there some place where they used electric lanterns and also the oil lamp, but they both worked, they both hung on a bracket at the [657] end of the dock just the same.

Q. What do you have on there now?

Mr. Cashatt: I object to that, your Honor.

The Court: Sustained.

Mr. Cashatt: As improper.

Mr. MacGillivray: I would like to be heard just a second on this.

The Court: All right, I will excuse the jury until 1:30, then.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: All right, I will hear you on that now.

Mr. MacGillivray: Your Honor, the purpose is to bring out evidence as to practices adopted since the accident of July 17, 1952. It is not for the purpose of showing negligence on the part of the

(Testimony of Francis T. Corrigan.)

Northern Pacific on that date, but is being brought out for the purpose of showing that there was another or a practical method of safeguarding the condition there on the night of July 17, 1952.

On that, I might refer your Honor to the case of *Hatcher vs. Globe Union Manufacturing Company*—

Mr. McKevitt: What is that citation?

Mr. MacGillivray: 178 Washington, 411—where it was held that on the issues as to negligence in the presence [658] of poisonous dust in a factory, evidence of measures taken subsequently to install a suction device to carry off the dust is not admissible to prove negligence, but is admissible when expressly limited to the practicability of safeguarding the instrumentality.

The case of *Cochran vs. Harrison Hospital*, 42 Washington (2d), 264:

“As a general rule, evidence of subsequent repairs is not admissible to prove prior negligence. An exception to that rule is that such evidence may be admitted for the limited purpose of showing dominion or control over the instrumentality or to show the practicality of the use of a safeguard.”

There are other Federal cases here, I believe, to the same effect: 87 Federal Supplement, 706; 156 Federal (2d), 109, and 156 Federal (2), 112. Then another case, 186 Federal (2d), 134.

Mr. Cashatt: Your Honor, in this situation we have, of course, the two companies, we have Addison Miller and we have Northern Pacific. If Ad-

(Testimony of Francis T. Corrigan.)

dison Miller has done things since this accident occurred——

The Court: Let me ask you, Mr. Gillivray, what do you propose to show by this line of questioning? I could [659] tell more about it if I know what it is you have in mind.

Mr. MacGillivray: Well, I propose to show any safety measures taken, not by Addison Miller, but by the Northern Pacific, to safeguard the conditions existing at the icing dock subsequent to July 17, 1952. I am not interested in any measures that might have been taken, if such were taken or have been taken, by Addison Miller; I am interested only in measures taken by the Northern Pacific.

The Court: Well, it is a little difficult. If you inquire and it appears that measures have been taken by Addison Miller, it is going to be prejudicial, isn't it, to the defendant here, even though I instruct the jury to disregard it?

I think there should be some reasonable prospect of eliciting that the N. P. has taken measures that can be taken as indicating that other safety measures were possible and practical at the time of the accident and before.

Mr. MacGillivray: I don't think that should be prejudicial to the defense here, because, as I understand, the basic defense is to lay the blame on them and say the blame is all Addison Miller.

Mr. McKevitt: No, no, that isn't the basic defense. Don't tell us what the defense is.

The Court: I think, Mr. Cashatt, perhaps we

will get some opportunity to look at these cases during the noon [660] hour and we will both be in a better position to discuss this.

Mr. Cashatt: Fine.

The Court: If I should think they warrant admission of the evidence.

So we will recess until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 p.m., this date.) [661]

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had in the absence of the jury:)

The Court: I have examined the two Washington cases that you cited, Mr. MacGillivray, and some of the others I had difficulty finding them. I think that I probably put the page or volume down wrong here. I was primarily interested in the Washington cases, anyway.

I will hear you, then, if you care to be heard on it.

Mr. Cashatt: Your Honor, I just had a few minutes and I briefly went through the two Washington cases. I hardly had time to read them, but the main distinction I would say there is the fact that there is no question about who made the change or anything, and in our case here we have the situation where the plaintiff was the employee of Addison Miller and not the Northern Pacific Railway. And if we get into any question about changes made subsequently, I think it opens up a broad

field as to whose changes they were, and so on and so forth.

And, further, that the cases cited I don't believe [664] are applicable to the situation we have here. After an accident occurs, we all know that things can be done, there is no limit. It always has been history that we are not infallible and that when something happens, better things can be done later.

But I principally urge that it would be prejudicial to the defendant in this case, your Honor, because of the fact that we do have Addison Miller and Northern Pacific in here, and there wouldn't be any way that counsel could question Northern Pacific witnesses or Addison Miller witnesses as to what was theirs and what was the other, and I just sincerely feel that it certainly would be prejudicial to the defendant Northern Pacific in this case to permit the evidence of that nature to go in.

The Court: Well, I think I had occasion to apply this rule in a prior case here, that was a case involving a railroad company and its employee, and I was under the impression that it was a master and servant rule, and I notice in looking at these cases that for the most part the question seems to arise and the rule seems to have been announced in master and servant cases, but I also notice that there isn't any qualification in the statement of the rule that it is limited to protection of a servant or employee by an employer.

And in the case of *Cochran vs. Harrison Memorial* [665] Hospital, 42 Washington (2d), 264, the Supreme Court of the State of Washington recog-

nized the rule and stated it and applied it in a case that didn't involve master and servant at all. That was a case where a patient in a hospital fell out of the bed and there was a question of whether they properly protected her from that sort of an accident.

I think that counsel should be permitted to cross-examine for the purpose only, of course, of showing, if he can, that measures were taken—I won't say by the Northern Pacific Railroad Company, but measures in which the Northern Pacific Railway Company participated, in order to show only that it was practicable to safeguard the men working about the Addison Miller dock in some manner other than the blue light method.

Now you have to bear in mind here that this method upon which the defendant relies was one that was, I presume, as far as the evidence shows, jointly installed and jointly operated by Addison Miller and the railroad company. The blue light was on the dock, the Addison Miller dock, and the railroad employees honored it, so that one of them would put up the blue light, the Addison Miller foreman, and the switchmen would honor it. Now if some mutual arrangement was made other than that subsequently, why it seems to me that the railroad company would be bound by it, even though Addison Miller participated in it. If it were wholly [666] something that Addison Miller did without any collaboration by the Northern Pacific, that might be different, but here we have the two of them working the blue light method. Now if the

two of them use some subsequent method, I think that that evidence would be permissible here for the limited purpose indicated by the Washington Supreme Court, and I think the Court should so instruct the jury.

I can't certainly sit here and say to counsel for the plaintiff, "You can't cross-examine this witness to try to bring this out because it might develop after you have cross-examined that the measures were only those of Addison Miller." I have no right to assume that in advance, if the cross-examination is in good faith pursued, and I haven't reason at this stage to think otherwise.

Mr. Cashatt: I have one other question, then, your Honor, might as well take it up now, I think it might save time.

Under your Honor's ruling, then, I believe it would be in order for us to present evidence showing what Addison Miller has done since this accident to prevent a recurrence of the same thing.

Mr. Etter: That is the thing the Court says is qualified so far as our inquiry is concerned. The good faith has got to involve both of them; we can't pin it on Addison Miller, as I understand the qualification. [667]

Mr. Cashatt: The matter I have in mind, your Honor, they have put up big signs right at this doorway. One of them is "Do Not Dump Slush Across the Track," and the other one, "Be Careful. Cars will be moved at any time." The evidence would show that was done solely by Addison Miller

for the protection of their own employees, and I am raising it now because it might be anticipated.

The Court: I don't know on what theory that would be admissible, because certainly you are not conceding that the Northern Pacific is liable for any negligence on the part of Addison Miller.

Mr. Cashatt: No, but this is a situation, your Honor, that the negligence in this case was Addison Miller's, anyway, not that of Northern Pacific.

Mr. McKevitt: The question of proximate cause enters into it.

Mr. Cashatt: That's right.

The Court: What do you think about that, Mr. MacGillivray?

Mr. MacGillivray: The question, as I see it, as your Honor has indicated, is, first, what safeguards and changes have been made by the Northern Pacific individually since July 17th; secondly, what changes and safeguards have been instituted by Northern Pacific and Addison Miller, if any, jointly since July 17, 1952. Any changes or safeguards [668] adopted by Addison Miller individually would not be admissible.

The Court: Of course, what you are doing there is you are bringing around on the other side now, or attempting to do so, what the Supreme Court says this evidence must not be used for. What you are trying to use it for is to show the negligence of Addison Miller, but Addison Miller was negligent and have recognized it because they have made changes to safeguard it subsequently.

Now that use of the evidence can't be used by you or by the other side either.

Mr. Cashatt: That wasn't my purpose, your Honor. My purpose, just like the signs I mentioned, is to show that that could have been done in a safer way, not to go across the tracks, and so it is for the same purpose as the plaintiff is requesting that the other be permitted; not to show negligence, but it is on that theory, that the instruction and the practice out there now shows that it could have been done in a safer way than it was before.

Mr. MacGillivray: We are not here concerned with the actions, either before or after, of Addison Miller; we are here concerned with the actions individually or actions in which the Northern Pacific took part.

The Court: Well, you are only incidentally concerned with the actions of Addison Miller. If the negligence of Addison Miller is the sole cause of the injury, then, of [669] course, the verdict would have to be for the defendant.

Mr. McKevitt: That's right. The proximate cause of the accident has got to be determined in some manner, certainly.

The Court: But I can't see that you have involved here the duty of Addison Miller to protect its employees. What we are concerned with is whether Addison Miller was guilty of negligence or not, and, of course, if you show what signs they have put up and what precautions they have taken later, then we go into the question of the duty of

Addison Miller towards its employee, which I don't think is material here.

Mr. McKevitt: Well, my position is this, then, in dealing with the question of what was the proximate cause of this accident or one of the proximate causes: That if the evidence disclosed that Addison Miller's foreman directed this boy to do something that was inherently dangerous, and because of his extreme youth he thought he had to obey that, why then I think we would be entitled to show that it wasn't our negligence that put him in that position. He couldn't have gotten hurt unless he got in that position, and surely the N.P. didn't put him there, Addison Miller put him there.

The Court: I think the answer there is that if Addison Miller's negligence is the sole negligence, then the verdict should be for the defendant. [670]

Mr. McKevitt: That's right.

The Court: If there was some incidental negligence that substantially contributed on the part of the Northern Pacific, then, of course, the Northern Pacific would be liable in the absence of contributory negligence.

Mr. Etter: In other words, if there were two proximate causes. In other words, counsel mentioned one of the proximate causes; well, if it so happens that one of the proximate causes is Addison Miller's and one of the proximate causes is Northern Pacific's, the proximate cause of Addison Miller is disregarded and is no defense to Northern Pacific.

Mr. McKevitt: No, we are talking about the question of concurring negligence.

(Whereupon, the following proceedings were had [673] in the presence of the jury:)

The Court: Proceed.

FRANCIS T. CORRIGAN

having been previously sworn, resumed the stand and testified further as follows:

Recross Examination—(Continued)

Q. (By Mr. MacGillivray): Mr. Corrigan, since July 17, 1952, what procedures and safeguards have been adopted by the Northern Pacific Railway looking toward the protection of employees of Addison Miller who might be working on or about the icing dock of Addison Miller on or about Tracks 12 and 13?

Mr. Cashatt: Just if he knows of his own knowledge, your Honor.

A. The Northern Pacific management has instructed Addison Miller that they will take means to give their men more protection while these men are working around the ice dock performing the services for which they are employed.

Q. (By Mr. MacGillivray): What means have been suggested by Northern Pacific?

A. The superintendent of Addison Miller—I want to [674] qualify that. I think it is the superintendent. There is a Mr. Anderson was given instructions to have the foreman of Addison Miller Company give the yardmaster advance notice when he was going to do any work around the ice dock.

Q. And has that procedure been adopted since July 17, 1952?

(Testimony of Francis T. Corrigan.)

A. Well, really, I am not in a position to answer that because I am not on duty out there 24 hours a day and I don't have the direct connection with that work, so I wouldn't care to answer.

Q. Well, has that procedure been in effect since July 17, 1952, during the 8 hours that you are present and working in the yardmaster's office?

A. Well, during the 8 hours that I am actually on duty there, I might be in my office and I might be down at the passenger depot, down at the Erie Street yard, down at the east end of the yard, any place where my duties would force me to go, so that would be handled by the assistant general yardmaster on duty and I wouldn't be able to answer that definitely.

Q. Well, he is under your supervision?

A. Yes.

Q. And the suggestions to Addison Miller, were they made by you or by one of your assistants under your [675] supervision?

A. Well, really, I don't know just exactly where the suggestion did come from, to be honest with you. I was called up in the office relative to that, and where it came from, I do not know.

Q. Well, didn't you convey those suggestions to Addison Miller? A. No, I didn't.

Q. They were conveyed under your supervision by one of your assistants? A. No, no.

Q. By whom?

A. My conversation regarding this point with Mr. Anderson was made with the superintendent

(Testimony of Francis T. Corrigan.)

of the Idaho Division at that time, who was then Mr. Dorfler.

Q. Well, you were a party to that conversation?

A. Yes, yes.

Q. And in that conversation, it was the understanding and conclusion of those involved, both representing Northern Pacific and Addison Miller, that additional safeguards to protect employees, in addition to those existing prior to July 17, 1952, were necessary?

Mr. Cashatt: I object to that, your Honor.

The Court: Yes, I think that is objectionable. Ask him what the arrangement was. [676]

Q. (By Mr. MacGillivray): Who all was in this conversation suggesting additional safeguards after July 17, 1952?

A. Mr. Dorfler, who was then the superintendent of the Idaho Division——

Q. Yourself?

A. Mr. Anderson and myself.

Q. When was that conversation held?

A. Oh, I would say early in February, 1953.

Q. February, 1953? A. Yes.

Q. Nothing was done between July 17, '52 and February, '53?

Mr. Cashatt: Object to that.

Q. (By Mr. MacGillivray): Was anything done?

The Court: What was that last question?

Mr. MacGillivray: Was anything done between July 17, '52 and February, '53?

A. May I answer?

(Testimony of Francis T. Corrigan.)

The Court: Yes, you may answer.

A. No.

Q. During those two dates, you operated in the same old way, is that correct?

Mr. Cashatt: I object to that, your Honor.

The Court: Well, I think I will sustain the objection on that. [677]

Q. (By Mr. MacGillivray): Other than that one suggestion, had other procedures been inaugurated by the Northern Pacific?

A. About what?

Q. To safeguard employees of Addison Miller?

A. No, I wouldn't say that there has been any radical changes made.

Q. Well, have any procedures been adopted and inaugurated by the Northern Pacific and Addison Miller acting jointly to protect and safeguard employees of Addison Miller on and about the tracks since July 17, 1952?

A. Well, not to my knowledge, no.

Q. Well, is it not a fact, Mr. Corrigan, that since that date, you do not float empty unattended cars at night into Tracks 12 or 13 adjacent to the Addison Miller dock when the white lights on that dock are illuminated and men are working on and about that dock?

Mr. Cashatt: I object to that. I believe that is getting outside the scope of your Honor's ruling.

The Court: Overruled.

Mr. McKevitt: Understand the question?

(Testimony of Francis T. Corrigan.)

Mr. MacGillivray: Read the question.

(The question was read.)

A. The white lights to us don't mean a thing.

Q. (By Mr. MacGillivray): They didn't prior to July 17, [678] 1952? A. Never did.

Q. And do I understand they still don't?

A. They still don't.

Mr. MacGillivray: That is all.

The Court: Before you proceed with your re-direct examination, I think I should just say briefly, members of the jury, that I will instruct you at the conclusion of all the evidence of the rules of law that you are to follow in arriving at your verdict, but I think at this stage I should tell you that this particular evidence is admitted for only a particular purpose and should be considered only for that purpose.

Any safeguards that you may find from this testimony that the Northern Pacific Railway Company took by way of protecting workers of Addison Miller around this icing dock in their work there, any that you may find from this evidence that were taken since July 17, 1952, the date of the accident, is not to be considered as evidence of negligence on the part of the Northern Pacific Railway Company so far as the injury of this minor Gerald Stintzi is concerned. It is admitted only for the limited purpose of bearing on the question to show the practicability of additional safeguards other than those employed on July 17, 1952.

(Testimony of Francis T. Corrigan.)

It is to be considered only for that purpose, as to [679] the practicability of the safeguards.

You may proceed, then.

Redirect Examination

Q. (By Mr. Cashatt): Mr. Corrigan, you just answered one of counsel's questions that the white lights didn't mean anything to you. Mr. Corrigan, what do the blue lights mean to you as far as the Addison Miller employees are concerned and as far as your own employees are concerned?

Mr. MacGillivray: Objected to as improper re-direct and repetition.

The Court: It is about the third time he has said, it seems to me——

Mr. MacGillivray: That's right.

The Court: ——that they protect the cars along the dock; isn't that it?

A. Protect the men working around the cars.

The Court: You don't move into those cars when the blue lights are on on either Track 13 or 12?

A. That's right.

The Court: I think he has covered that.

Mr. Cashatt: Well, that is all.

The Court: Any other questions?

Mr. MacGillivray: That is all. [680]

The Court: That is all, then, Mr. Corrigan.

(Witness excused.)

Mr. Cashatt: Mr. Williams, please.

GORDON WILLIAMS

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name is Gordon Williams? A. Yes.

Q. And where do you reside?

A. North 4003 Post.

Q. How long have you lived in Spokane?

A. Since 1938.

Q. And what is your occupation?

A. I am a railway clerk.

Q. By whom are you employed?

A. Northern Pacific Railroad.

Q. How long have you worked for the Northern Pacific Railroad? A. January of 1942.

Q. And can you tell us anything more specific about your job as a clerk?

A. Well, since 1949 I have been employed as an ice foreman [681] for the Northern Pacific.

Q. And where are you located? Where do you do your work?

A. Yardley yard, Washington.

Q. And you have followed that work since 1949, have you?

A. In this particular department, yes.

Q. Now what are the duties of that job as ice foreman, and are they the same now as they were back in 1952?

A. There has been no radical changes, no.

Q. Well, what were they, say, in July, 1952?

(Testimony of Gordon Williams.)

A. Well, the Northern Pacific has on duty 24 hours a day an ice foreman at Yardley yard. He, in turn, depending on the amount of traffic in that particular shift or time, calls out a certain amount of helpers. I suppose they have been referred to here in the past as assistant ice foreman, but they are actually called ice helpers. And it is our responsibility to instruct and advise Addison Miller of the amount of cars coming in, the amount of icers that the trains will have on them, the times they will arrive. It is up to us to keep a record of much much salt and ice is used in these various cars. It is also up to us to see that they are properly heated and ventilated in the winter time and such as that. It is up to us to see that the yardmaster is notified when these cars are spotted, when Addison Miller is finished with their icing of these [682] certain cars, it is up to us to instruct the yardmaster that they are done, and he, in turn, has the switch engine take them off.

Q. And in your work, Mr. Williams, do you keep track of the salt cars that come into the Yardley yard?

A. Yes, it is up to us to keep track of the salt, that is, its arrival in the yard, the time it is unloaded. In fact, the day ice foreman orders all the salt that is used for the icing operations at Yardley.

Q. Now on July 17, 1952, did you work that particular day? A. Yes, I did.

Q. And what time did you come to work that day? A. 4 p.m.

(Testimony of Gordon Williams.)

Q. In the course of your work that day from the time you arrived, did you make a written record of the cars that came in the yards that were iced?

A. That is part of my duties as an ice foreman is to keep a record of all the perishables that entered the yard.

Mr. Cashatt: Your Honor, I would like to just offer the day of July 17, 1952, but I want to show that it is right out of the original book, and I can have the witness open it and take it out over there, if that is agreeable.

The Court: Well, all right.

Mr. Cashatt: (To Clerk) These sheets, I think if [683] you will mark those and we will staple those together.

The Clerk: Marked as Defendant's 38 for identification.

Q. (By Mr. Cashatt): Mr. Williams, the book I am now handing you that has some of the sheets marked Defendant's Exhibit No. 38, what is this book?

A. This is what we term as a 1755 form. It is a record of all perishables that go through or stop in the City of Spokane.

Q. At Yardley?

A. At Yardley, Washington.

Q. And is that record made up from day to day?

A. From day to day, yes. It starts at 12:01 each day.

Q. When you came on shift at 4 o'clock on

(Testimony of Gordon Williams.)

July 17, 1952, did you make the record until you went off shift that evening? A. Yes.

Q. And what time did you go off shift that evening? A. 12 midnight.

Q. Mr. Williams, referring you to the sheets marked Defendant's Exhibit No. 38 for identification, 1, 2, 3, 4, 5, 6, are those the entries that you made on July 17, 1952?

A. This here is part of my work, too (indicating).

Q. Should be one more sheet? [684]

A. This sheet right here (indicating).

Q. Fine. Do you have a knife there that you could open this, Mr. Williams?

Mr. McKevitt: How many sheets, Mr. Cashatt, are there?

Mr. Cashatt: Seven sheets.

Q. You are now, Mr. Williams, taking the 7 sheets marked as Defendant's Exhibit No. 38 for identification out of the book which cover all entries for the month of July, is that correct?

A. That's right, that covers my shift.

Q. And this covers your shift from 4 o'clock in the afternoon on July 17, 1952, until midnight?

A. That's right.

Mr. Cashatt: Offering Defendant's Exhibit No. 38.

Mr. Etter: May I question the witness?

The Court: Yes.

(Testimony of Gordon Williams.)

Voir Dire Examination

Q. (By Mr. Etter): These records were made by you, were they, Mr. Williams?

A. That's right.

Q. These sheets that you have identified that are marked as the Defendant's Exhibit 38? [685]

A. Yes, sir.

Q. Do they indicate the refrigerator cars that came in?

A. All that is written on that report is refrigerator cars. There is no other type of car written on that 1755 report.

Q. Other than a refrigerator car?

A. That's right.

Q. Is that correct? A. That's right.

Q. These are cars that came in?

A. That's right, sir.

Q. These cars that you received in the yard on the 17th of July, Mr. Williams, refrigerator cars, as you say, are those cars filled when they come in, or are they packed with perishables from the time they come in?

A. Yes, sir. Of course, now, this covers various icing and protecting parts. Well, to take care of the business of the Northern Pacific, you might say, sometimes we will initially ice an empty and that may be on——

Q. What?

A. Initially ice an empty reefer, but that would be on that record, but that is still a refrigerator car.

(Testimony of Gordon Williams.)

Q. I see. What I am trying to get at, though, are all these refrigerator cars, are they full of perishables, the cars that are listed that have been received in? [686]

A. If they show on that record as loads, they will be loads.

Q. I see. Where do you find that out by looking at this record?

A. Right there where it says "Commodity," I believe. This here (indicating) would be the contents of the car.

Mr. McKevitt: Can't hear you.

Mr. Etter: Speak out a little louder, we can't hear you.

A. On this report it shows contents of cars, and there we show the commodity that is in the reefer.

Q. Where you have this long mark running down here under "Contents," does that mean spuds?

A. That means spuds, that is a ditto.

Q. That is a ditto mark, is that the idea?

A. Yes.

Q. Do you bring in tires in a refrigerator car?

A. They do sometimes, yes.

Q. They do. Getting educated.

Mr. McKevitt: Rubber can melt.

Q. (By Mr. Etter): These cars that are numbered here and that are brought in, the various services that you say are performed upon them, are indicated here? A. Yes, sir.

Mr. Etter: No objection. [687]

(Testimony of Gordon Williams.)

The Court: It will be admitted.

(Whereupon, the said sheets were admitted in evidence as Defendant's Exhibit No. 38.)

Q. (By Mr. Cashatt): Mr. Williams, I see the first entry, is that a single car, the first one on Exhibit No. 38? A. This is.

Q. Yes.

A. That is one car. This "SLRX," this here would mean that there was two cars in this train that arrived.

Q. And I see a time of 3:45 p.m.; what can you tell us about that?

A. 3:45 is the time the train arrived.

Q. And does it show what time those cars were finished icing?

A. The cars were spotted at 4:25 p.m. and they were done icing at 4:35 p.m.

Q. Then next I see designation Train 5112 and "4-p" after that. What does that mean?

A. That means that 5112 arrived at 4 p.m.

Q. Is that a number of a train?

A. That's right, that is an engine number.

Mr. McKevitt: Engine number. [688]

Q. (By Mr. Cashatt): And that arrived at 4 p.m.? A. Yes.

Q. How many cars were there in Train No. 5112?

A. Well, I would have to count them, I don't know. Do you want me to count them?

Q. Yes. I would like to have you count them.

A. 56 cars.

(Testimony of Gordon Williams.)

Q. 56 cars in that train. And what time did that train arrive? A. At 4 p.m.

Q. And what was done with that train, does this record show, or does this record go into that?

A. Well, this record, it shows a spot of 4:05 and that would mean that the train was more than likely ran right into Track No. 12 at the east end of the dock and they cut the air and set the head end over to 13. It shows a spot of 4:05 p.m. here.

Q. That means that it was put on Track 12 and 13, does it?

A. I would say that is what happened.

Q. Does the record show what time Train No. 5112 was iced or the icing operation was completed?

A. The first spot shows 4:05 and we were done icing with the first spot at 5:05. We received a second spot, it looks like, at 5:15, and we were done icing the second spot at 6:10. [689]

Q. And then was the train put back together?

A. Well, it left town, I imagine it was.

Q. What time did it leave town?

A. 7 p.m.

Q. And does that show on Exhibit 38?

A. It shows departure, yes, 7 p.m.

Q. And that time 7 p.m. is under the heading "Forwarded" with the designation "Time," is that right? A. That's right.

Q. Now after that train left at 7 o'clock, when did the next refrigerator cars arrive in Yardley, Washington from any place?

(Testimony of Gordon Williams.)

A. We had an S. P. & S. train come in at 6:35 p.m. with one car of tomatoes.

Q. And what was done with that one car of tomatoes?

A. Well, according to the instructions on the weigh bill, it was not necessary to spot it to the dock, so apparently the car was inspected on the track that it arrived on and was then—I see that it is a city load—was more than likely switched into Track 6 and sent to town.

Q. In other words, that car wasn't iced, is that right?

A. No, sir, we show servicing at 8:05 p.m. and that is the extent of the service to it.

Q. Then was that car spotted on either Track 12 or 13? [690]

A. No, sir, I don't believe it was.

Q. Then following that, Mr. Williams, when was the next refrigerator cars to arrive on this July 17, 1952?

A. The 6019 arrived at 9:55 p.m.

Q. And were any cars in that train iced?

A. No, sir, they were not.

Q. Following the arrival of that train, anything further while you still were on shift until 12 o'clock that night?

A. 5402 arrived at 11:35 p.m. and he had one icer, and that was spotted at 11:50 and okayed at 12:01 a.m. That would be the 18th.

The Court: Are we interested in trains that ar-

(Testimony of Gordon Williams.)

rived after the accident here? Any purpose in showing that?

Mr. Cashatt: Just to finish the day.

The Court: Isn't it enough to show that none arrived up until the time of the accident?

Mr. Cashatt: Well, that is the last one.

Q. Now, Mr. Williams, in your work what do you have to do with the salt cars when they arrive?

A. Well, when a salt car arrives in Yardley yard, the general practice is to consult the Addison Miller plant and see if they feel they have room in the salt house to unload a car of salt. Sometimes that salt will store up to the point that we have to hold the cars out [691] for several days in order to make room for it. The general thing is to call them and ask them if they have room in the salt house for the salt and, if they say they have, why then we start working on the yardmaster to get the car spotted.

Q. What do you mean "spotted?"

A. Spotted to the salt house so that it can be unloaded.

Q. Does that mean it has to be lined up with the door of the salt house? A. That's right.

Q. Now in your work as ice foreman, do you keep any record of salt cars that arrive, when they arrive and when they are unloaded?

A. Yes, we do.

The Court: You can offer just a page, if you wish, and then remove it later or substitute a copy, if you care to do that.

(Testimony of Gordon Williams.)

Mr. Cashatt: That is what I would like to do, your Honor, is offer the page.

The Court: Yes, just the page in the book.

Mr. Cashatt: Then I will substitute a copy.

The Clerk: I have marked Defendant's 39 for identification.

Q. (By Mr. Cashatt): Mr. Williams, handing you the book which has one page marked Defendant's Exhibit No. 39 [692] for identification, what is that book?

A. Well, that is the book that we keep our record of salt that we use and also the amount of cars that are ordered for the following year.

Q. And is that record kept day by day?

A. This record here is, shall we say, kept when needed. We don't have a car of salt every day.

Q. But what I mean, is it a running record, is it made in regular rotation?

A. That's right.

Q. I mean if a car of salt would come in or did come in on July 1, 1952, would that be entered in the book at the time it arrived?

A. Yes, it would.

Q. And would there also be an entry made at the time the car was unloaded, the date it was unloaded?

A. There would be, yes.

Q. Now, referring to the sheet marked Defendant's Exhibit No. 39 for identification, without relating what is on it, tell us what that sheet is, just the period of time it covers, and so on.

A. Well, this sheet here is a record for the year

(Testimony of Gordon Williams.)

of 1952, and it covers all cars of salt that were brought in and unloaded at the Yardley ice dock.

Q. For the year of 1952? [693] A. Yes.

Mr. Cashatt: Offering Defendant's Exhibit No. 39.

Mr. Etter: You are offering this sheet with these two attached?

Mr. Cashatt: That is correct.

Mr. Etter: The back of this, too?

Mr. Cashatt: Well, the back we can blank it out.

Mr. Etter: Is that part of this exhibit or not?

Mr. Cashatt: No, just the front. See, that pertains to something else, we will just block that out.

Mr. Etter: May I inquire on voir dire a few minutes?

The Court: Yes.

Mr. Etter: The back of this apparently is not part of the exhibit, but the sheet marked has two attachments?

Mr. Cashatt: That is correct.

Voir Dire Examination

Q. (By Mr. Etter): Mr. Williams, so we will have an understanding of the exhibit, I note here you have salt ordered for 1952. Does this exhibit which has been identified by you purport to be the salt that you brought in or that was shipped into the N.P. yard despite anything that might appear here? A. Well, you see here—— [694]

Mr. McKevitt: Louder, please.

Mr. Etter: Speak up a little louder.

(Testimony of Gordon Williams.)

A. On December 20th of 1951 we placed our order for our salt for the following year of 1952.

Q. I see.

A. And we placed, as you will see, one car for January 15th.

Q. Well, that is, you placed these orders?

A. This order was placed.

Q. That order was placed?

A. Now this list here was made with the understanding that we had ordered this amount of cars and would receive them, and then he made a list here of when they were supposed to come in and, consequently, it shows each day that they arrived.

Q. I see.

The Court: You say "he" made a list?

A. The ice foreman, the day ice foreman.

The Court: I see.

Q. (By Mr. Etter): Did you make any of these entries? A. I probably have, yes.

Q. Which ones?

A. Right offhand, I can't see any that I have made.

Q. You can't see any that you have made?

A. No. [695]

Q. Who is it keeps this book, anyway?

A. The day ice foreman at Yardley keeps that book.

Q. The day ice foreman? A. Yes.

Q. And you have made no entries here?

A. Well, not that I can see or can recognize. I may have some dates in there.

(Testimony of Gordon Williams.)

Q. You don't know anything about salt arriving so far as this exhibit is concerned or as it indicates except by what it purports to show; isn't that correct?

A. No, we know when salt comes in by other various things from this.

Q. You didn't make any of these entries?

A. No, I don't have to make them entries.

Q. Well, do you know whether each one of these entries was made personally—

A. I do know that when salt comes in on my shift, I leave a note for him that it has arrived.

Q. No, but I mean can you testify to your personal knowledge as to the accuracy and authenticity of this exhibit? A. Would you say that again?

Q. Can you testify of your own personal knowledge as to the accuracy of this exhibit which has been presented here, this identification, and the authenticity and the [696] accuracy of the entries?

A. I would say that it is correct, yes.

Q. Can you testify of your personal knowledge about it?

A. That I kept it up? There is four men to keep that besides me.

Q. Yes, but you didn't make any of these entries, as I understand?

A. I wouldn't say that it was accurate because I don't know that point of it.

Q. You don't know that this is accurate or not?

A. I have no reason to disbelieve that it isn't accurate.

(Testimony of Gordon Williams.)

Mr. Cashatt: I might shorten this:

Q. Mr. Williams, who was the man who made this up? A. Mr. McCartney wrote that up.

Mr. Etter: Did he write them?

Mr. Cashatt: I won't waste any more time, I will bring the other man in.

The Court: I don't think we should spend any more time than that.

Q. (By Mr. Cashatt): Mr. Williams, how long did you say you worked out at Yardley?

A. I have worked out at Yardley since January of '42.

Q. And during that time when you were out there, were you ever on the Addison Miller ice dock? A. Many times. [697]

Q. Did you ever see any Addison Miller men carrying out any slush ice?

A. Not that I recall, no.

Q. Did you ever at any time see any Addison Miller men crawling under the couplers of box-cars or stock cars? A. Not that I recall, no.

Q. Did you ever see any Addison Miller men crawling under the couplers of stock cars or any other cars carrying slush ice?

A. No, sir, I have not.

Mr. Cashatt: You may examine.

Cross Examination

Q. (By Mr. Etter): As I understand it, Mr. Williams, the Northern Pacific has on duty 24 hours a day an ice foreman, is that the idea?

(Testimony of Gordon Williams.)

A. That's right, sir.

Q. And I think you said, too, that the ice foreman, depending on traffic, calls out all the help he needs in the form of assistant icemen, I guess you call them? A. That's right.

Q. Is that correct? A. Yes, sir.

Q. And I think you said that the instruction on the amount [698] of ice and salt that goes in, you have supervision over that for Northern Pacific?

A. Yes, sir, we do.

Q. Where do you exercise that supervision physically in the yards at Yardley? Where do you supervise this ice-loading operation? Where do you determine the amount of salt that is put into the Northern Pacific cars?

A. From the ice dock.

Q. From the ice dock? A. Yes, sir.

Q. So if there is an icing operation going on, you are right down on the ice dock, is that right?

A. The ice helpers are, yes.

Q. The ice helpers. You are not, is that it?

A. I am not, no, sir.

Q. You are not?

A. Not all the time. Sometimes, not all the time.

Q. You made periodic visits, too, do you not?

A. Sometimes, yes.

Q. I see. And these men, these icemen that you are talking about, are they under your direct supervision? A. The ice helpers?

Q. The ice helpers? A. Yes, sir. [699]

(Testimony of Gordon Williams.)

Q. And they are responsible to you?

A. Yes, sir.

Q. And you are responsible to the Northern Pacific? A. Yes, sir.

Q. Is that correct. And are these ice helpers engaged in their occupation on behalf of the Northern Pacific on the ice dock any time that cars are being iced by Addison Miller? A. Yes, sir.

Q. Any and all times? A. Yes, sir.

Q. One or more of them?

A. One or more, yes.

Q. One or more. And you at times yourself make these inspections? A. Yes, sir.

Q. The purpose being, of course, the icing of refrigerator cars for the Northern Pacific Railroad?

A. Yes, sir.

Q. Which it transports in interstate commerce and in intrastate commerce and all over the country? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Now you indicated in your testimony concerning an [700] exhibit, Mr. Williams, and I refer now to Defendant's Exhibit No. 38, that you had marked here on your shift the number of cars or the reefers or refrigerator cars that came in or arrived, I gather, during your shift or tour of duty on the 17th day of July, 1952; is that correct?

A. Yes, sir.

Q. And I gather that that is the complete list of those cars that came in? A. Yes, sir.

Q. Is that right? A. Yes, sir.

(Testimony of Gordon Williams.)

Q. And there were also cars on your shift up until this accident at about 8:30 that left, you say, one train, I think? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Now are these the only cars, Mr. Williams that you had anything to do with on your shift, that is, refrigerator cars?

A. Yes, sir, I believe that would be correct in saying yes to that question.

Q. In other words, these cars are the only refrigerator cars about which you have any knowledge on the 17th day [701] of July, 1952?

A. Yes, sir.

Q. Are there any other cars, refrigerator cars, that were processed or handled by any icemen working for you or under your supervision up until 8:30 on that evening other than these cars which appear upon this exhibit?

A. Well, sir, in order to answer that, I would have to look at the balance of the records. That is two years ago, I don't recall. This is the first I have saw of the record, I don't know, I would have to look.

Q. Well, then, these aren't the complete records of the refrigerator cars or all of the refrigerator cars that you or your men inspected or had supervision over, are they?

A. To my knowledge, yes, sir, they are.

Q. Well, to your knowledge, these are the cars that arrived, as I understand it?

A. That's right, sir.

(Testimony of Gordon Williams.)

Q. These arrived, and I am asking, did your icemen, to your knowledge, have any supervision or control over any other ice cars, refrigerator cars, other than those that appear upon that exhibit?

A. No, sir.

Mr. McKevitt: You mean on July 17th?

Mr. Etter: On July 17, 1952, prior to 8:30. [702]

A. No, sir.

Q. They did not? A. No, sir.

Q. Now it isn't your testimony, Mr. Williams, is it, that these cars, these refrigerator cars, which appear upon Defendant's Exhibit, I think it is 38, are the only refrigerator cars that were present in the whole Yardley yards on the 17th day of July, 1952, is it?

A. Let's not say that they are the only ones present; let's say that they are the only ones we serviced in that time.

Q. That is the only ones you serviced that came in, is that right? A. Yes, sir.

Q. All right, then, you will answer my question, you don't say, then, that these are the only refrigerator cars that were in the whole Yardley yards on the 17th of July, 1952?

A. No, sir, I wouldn't say that. There is many, many empties on the rip track, probably full of them.

Q. Full of them. Are there any empty refrigerator cars any place but on the rip track?

A. Could be all over the yard.

Q. Could be all over the yard?

(Testimony of Gordon Williams.)

A. Yes. But we don't have any primary interest in empty [703] cars.

Q. You don't have any primary interest in empty cars. Tracks 12 and 13, they are general purpose tracks, isn't that true?

A. That's right, sir.

Q. And are all these other tracks that you have referred to where refrigerator cars may be scattered around, are they general purpose tracks?

A. Yes, sir.

Q. They are. To your knowledge, you don't know whether there were any refrigerator cars that you didn't service or didn't know anything about there on general purpose tracks, including 12 or 13, you don't know whether that is a fact or not, do you?

A. I beg your pardon, sir?

Q. You don't know whether there were other refrigerator cars, other than these you have on this list that you have stated were scattered all over the yard, possibly, you don't know, do you, whether any of them were on Tracks 12 or 13?

A. Sir, I know that when the cars are put to the dock, that I service them, and I know that I have got a record of them because I have weigh bills to cover them.

Q. Well, I am not questioning you on that, sir, I am [704] asking you whether you knew whether these refrigerator cars that are scattered all over the yard are placed at any specific locality? Are you prepared to say that none of them were on 12 and 13 other than these cars that day, July 17th?

(Testimony of Gordon Williams.)

A. Yes, sir, I would say that they weren't on there.

Q. They were not on there? A. Yes, sir.

Q. And how is it that you know?

A. Because the train pulled out of Track 12 and left it clear.

Q. Left it clear? A. Yes.

Q. At what time? A. 7 p.m.

Q. No other cars were put in, is that it?

A. To my knowledge—

Q. Reefer cars? A. No.

Q. Or any other cars?

A. That is, until the train arrived that had to be iced?

Q. That had to be iced? A. Yes.

Q. What time was that?

A. What time did that train come? I can't recall. 9:35, [705] wasn't it?

Mr. McKevitt: Now counsel—

The Court: 9:35, he said.

Mr. Etter: 9:35.

Mr. Cashatt: I think he can look at the exhibit, if he wishes, your Honor.

Mr. Etter: All right.

Q. That train came in at 9:35 and the other train pulled out at six o'clock something. Do you want to look at it and find it?

A. The freight train left at 7 p.m., didn't it?

Q. The freight train left at 7 p.m., didn't it? I don't know, but you can probably find it here.

A. That's right, 7 p.m.

(Testimony of Gordon Williams.)

Q. 7 p.m. And you know that there weren't any cars on Tracks 12 or 13 until this train came in at 9:35?

Mr. McKevitt: Object to this as repetition, your Honor.

Mr. Etter: Just a minute, please.

Mr. McKevitt: Let me make an objection.

Mr. Etter: All right.

The Court: Overruled, he may answer.

A. To my knowledge, there was no cars to be serviced at that time, so I did not assume that there were any on the dock—or any on the tracks. [706]

Q. (By Mr. Etter): Do you know whether or not—

A. I know there was no cars to service.

Q. You weren't down there at that time, were you?

A. I don't have to be there, I know what is in the yard.

Q. Of course, I am not inquiring about what you have to do or anything else, I am inquiring whether you were there. Were you down at the dock between 7 and 9:35?

A. Yes, sir, I was.

Q. What time were you down there?

A. Shortly after the accident.

Q. Shortly after the accident. Were you down before the accident? A. No, sir.

Q. From 7 o'clock. Beg your pardon?

A. No, sir, I wasn't.

(Testimony of Gordon Williams.)

Q. I see. Then, you don't know whether any refrigerator cars were on 12 or 13, do you?

A. I know that there wasn't in the yard. If there wasn't any in the yard, where we are going to get them to put them there?

Q. Well, in other words, your testimony now is that after the train left, there were no refrigerator cars left in the yard?

A. To be serviced on Track 12, no.

Q. To be serviced, but is it your statement none of them [707] were left in the yard?

A. Sir, the city yard is full of reefers every day.

Q. Are you acquainted, Mr. Williams, with all of the switching movements; is that part of your duty, too? A. I would say I was, yes.

Q. You were. You are and were acquainted with all the switching movements on this evening in question, that is, July 17th?

A. I would say so.

Q. All right.

A. To the point of taking care of my own work, yes.

Q. That isn't what I asked. Do you know about all the switch movements in that yard that night?

A. No, sir, I don't think I do, no.

Q. You are acquainted with the ones that had to do with your icing of cars? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. All right, do you know anything about any switch movements of cars on Track 13 after the train left at 7 o'clock?

(Testimony of Gordon Williams.)

A. No, sir, I do not know of any reefers that could have been put there.

Q. Do you know of any cars that were put there? [708]

A. I know of cars that were put down there, yes.

Q. Do you know of them by reason of information secured since the accident, or did you know about them——

A. Yes, that is true.

Q. Or did you know about them at the time?

A. No, it was afterwards.

Q. Afterwards. How soon afterwards?

A. Well, knew they were there five minutes after the accident happened.

Q. Five minutes after the accident happened. So you knew they must have been there at the time it occurred; that is the reason that you know, is that true?

A. That is true.

Q. I gather from your testimony that it is definite with you, Mr. Williams, that there were no cars iced after 7 o'clock and until after 9:35?

A. That's right.

Q. Is that correct? A. Correct.

Q. When you were down—were you down, Mr. Williams, at the icing dock prior to the departure of the train which left at 7 o'clock on the 17th?

A. No, sir, I wasn't.

Q. Beg your pardon?

A. No, sir, I wasn't. [709]

Q. Were you down when the train came in?

A. No, sir.

(Testimony of Gordon Williams.)

Q. Were you down during any part of the time that train was being iced? A. No, sir.

Q. I assume that the only time that you were down at the dock that night was following the accident? A. That's right, sir.

Q. What time did you arrive down at the dock, Mr. Williams, the night the accident occurred?

A. Well, sir, I can't be too specific in that. I was called by the Addison Miller foreman and advised that there had been an injury down there and told to call the ambulance, and I called the ambulance and then I rushed right down there. The time, I couldn't say, I don't know. It was sometime after 8 o'clock.

Q. I am not trying to hold you to the time. When you got down there, young Gerald Stintzi was subsequently taken away in an ambulance?

A. No, sir, he laid there quite awhile.

Q. Yes, but I mean subsequently, sometime after, he was taken away in an ambulance?

A. Yes, sir.

Q. Did you go on the ice dock then?

A. No, sir, I had no reason to go up there. [710]

Q. Or were you anywhere near the salt shed about that time?

A. The accident happened right near the salt shed.

Q. Right near the salt shed. What was going on at the salt shed, if you noticed?

A. There wasn't anything going on there that I noticed.

(Testimony of Gordon Williams.)

Q. Nothing going on? A. No.

Q. And there were no reefer cars there when you got down there? A. No, sir.

Q. No refrigerator cars either in the cars that had been spotted or in the cars that had been floated in?

A. No, sir, that I had seen, I did not see any, no.

Q. You didn't see any. Mr. Williams, I don't think that you have had an opportunity to see this exhibit before. It is the Plaintiff's Exhibit 16. Do you recognize the picture other than for the fact that it is half of the west end and half of the east end of the salt house? A. Yes, sir.

Q. And other than the fact of the taking of the picture and the projection of half one way and half the other, that is an accurate representation, is it, of the salt house?

A. I would say so, yes. [711]

Q. When you got there, I understand that you said that young Stintzi was somewhere near the salt house or around it. Could you indicate, if it is possible, on this exhibit where he was, or are you able to do that?

A. Well, I would say that he was farther down than this picture shows. That would be farther east.

Q. He was farther east than is indicated by the picture?

A. I would say so, that is my best guess.

Q. That is your best recollection, thank you.

Mr. Williams, I might ask you this: To your recollection or to your personal knowledge, has more

(Testimony of Gordon Williams.)

than one salt car been taken into the salt shed at a time?

A. Sir, there may have been two cars on Track 13 full of salt at one time, but you can only unload one at a time. That is, up until the time of this accident; that is what you want, isn't it?

Q. Yes. And I assume you have had situations, have you not, Mr. Williams, where the salt pit, so-called, or the salt shed or whatever they call it, has been filled to capacity where they wouldn't take a full carload; isn't that true?

A. That's right, sir.

Q. And during that time, the carload of salt is not unloaded on the same shift or at exactly the same time or immediately after it is taken in, isn't that right? [712]

A. Yes, sir, they can fill the salt house to capacity and then call and say that they can't get any more in, and then we would order the car to be spotted and held.

Q. I see. Is that always done, or sometimes is the car left there for the salt to be taken out as it may be used? For instance, if there was a fruit train being iced on the other track, on the other side on 12, and you had your salt car being unloaded on 13, do you in every instance where a car is not completely empty remove the car from 13?

A. Well, sir, the car would not be unloaded unless it was blue flagged, and I don't see how they could possibly do that if they were supposed to be icing on 12.

(Testimony of Gordon Williams.)

Q. Well, no, say they were icing on 12 and you had a salt car being unloaded on 13; if you couldn't unload it in one day, on occasions have you left the salt car there and continued the icing on Track 12, or do you have any recollection of any instance of that kind?

A. Well, to my knowledge, they wouldn't let us keep that track tied up that long. They generally use it for storing east loads and stuff and we wouldn't be able to keep it that long. We would have to order it held and then they would put it back to their convenience.

Q. What you say, then, you don't know, but it is unlikely; is that a fair appraisal of your statement? [713]

A. It is unlikely, that's right.

Q. Now, in any event, it is true, is it not, that all of the icing operations of Addison Miller are conducted and carried out under the direct supervision of your ice department?

A. That's right.

Q. When you got down there that night, you could see Mr. Stintzi, couldn't you?

A. Yes, sir.

Q. In other words, the overhead lights, that is, the white lights, were on, weren't they, on the dock?

A. Yes, sir.

Mr. Etter: That is all.

Redirect Examination

Q. (By Mr. Cashatt): Mr. Williams, does the

(Testimony of Gordon Williams.)

Northern Pacific in any way supervise the carrying out of slush ice at the Addison Miller dock?

A. No, sir, we do not.

Q. Does the Northern Pacific have anything whatsoever to do with that operation?

A. To my knowledge, they do not.

Q. Now, Mr. Williams, from what you have told us about what you know about the operation on things being [714] carried out on Tracks 12 and 13 on July 17, 1952, and your going down after the accident, do you know of your own personal knowledge whether or not there was any salt car being unloaded at the time this accident occurred?

A. There was no salt car being unloaded at that time, to my knowledge.

Mr. McKevitt: To your knowledge, you say?

A. Yes.

Q. (By Mr. Cashatt): When you went down there—by the way, Mr. Williams, what do they use between the boxcar and the dock to unload a salt car?

A. Well, I suppose you would term it as a plate. It sets between the car and the window of the salt house to truck the salt across.

Q. When you went down to the dock after the accident occurred, did you see any of those plates around? A. No, sir.

Q. Did you look for any? A. No, sir.

Q. I see.

Mr. Cashatt: That is all.

The Court: Any other questions of this witness?

(Testimony of Gordon Williams.)

Recross Examination

Q. (By Mr. Etter): I gathered you said you didn't look for any steel plate?

A. No, sir, there was more important things to take care of besides that.

Q. That's correct. Did you look for a salt car?

A. No, sir.

Q. Beg your pardon?

A. No, sir, I didn't.

Q. You didn't look for a salt car. By the way, am I right, does the Northern Pacific own the salt that is used? A. Yes, sir.

Q. They do. How about these picks and things they use up on top, do they own those, too?

A. No, sir, I don't believe they do.

Q. Do you know?

A. I would almost—well, I would be positive that they don't own them; I would say Addison Miller owns the picaroons.

Q. Owns the picaroons.

Mr. Etter: All right, that is all.

Mr. Cashatt: That is all.

The Court: Court will recess for 10 minutes.

(Witness excused.)

((Whereupon, a short recess was taken.))

Mr. Cashatt: Mr. Woolf.

LLOYD WRIGHT WOOLF

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Just state your full name, please? A. Lloyd Wright Woolf.

Q. And where do you reside, Mr. Woolf?

A. 4525 North Calvin, Trentwood.

Q. And that is out in the Spokane Valley, is it?

A. Yes.

Q. How long have you lived in Spokane?

A. About five and a half years.

Q. Married man? A. Yes, sir.

Q. Family? A. Yes, sir.

Q. By whom are you employed?

A. Northern Pacific Railroad.

Q. And how long have you worked for the Northern Pacific [717] Railway?

A. Since about August 11th, I think, 1951.

Q. 1951? A. Yes.

Mr. McKevitt: Speak up, please, won't you?

Mr. Cashatt: So that everybody can hear, please.

Q. And what has been your work with the Northern Pacific Railway since then?

A. Ice helper.

Q. And as an ice helper, Mr. Woolf, what are your duties?

A. The ice foreman gives me the information regarding what is required on the refrigerator cars, service required, and I am kind of his leg man, I go out and do the work.

(Testimony of Lloyd Wright Woolf.)

Q. And do you actually go to the ice dock?

A. Yes, sir.

Q. And that is the Addison Miller dock, is it?

A. Yes, sir.

Q. Out at Yardley? A. Yes, sir.

Q. Your work with Northern Pacific, has that been in the yards at Yardley?

A. Beg your pardon, sir?

Q. Your work with Northern Pacific, has that been in the yards out there at Parkwater? [718]

A. Yes, sir.

Q. And now on July 17, 1952, did you work that day? A. Yes, sir.

Q. And what time did you come to work on July 17, 1952?

A. I don't recall the exact time, sir, but I suppose it would have been before the fruit train arrived by at least half an hour. That was the practice.

Q. Had you been notified that the fruit train would arrive?

A. Well, yes, that is why I was called out.

Q. Oh, you were called to come in and work while the fruit train was there, is that right?

A. Yes, sir.

Q. And you say you probably arrived there half an hour before the fruit train?

A. I don't recall the exact time, sir.

Q. The evidence in the case, Mr. Woolf, is that the fruit train No. 5112 arrived at 4 p.m. on July

(Testimony of Lloyd Wright Woolf.)

17, 1952, and was that the train that you recall you were to come down when it arrived?

A. Yes, sir.

Q. What did you do after arriving at the yards?

A. Well, I would—the standard practice is to go into the——

Q. What did you do that particular day? [719]

A. Well, I went in, as usual, and made out a list and took the foreman's instruction regarding each car, telling me how much salt and what percentage of salt should go in the cars by weight with the ice.

Q. In refrigerator cars? A. Yes, sir.

Q. And then after getting your list, did you go to the Addison Miller dock? A. Yes, sir.

Q. Were you there when the fruit train arrived?

A. Yes, sir.

Q. And on what tracks was it spotted?

A. 12, I believe, it came in on.

Q. And was some of it put on 13?

A. I'm not positive about that, I can't remember that for sure, but it was the practice to break it in two and shove back part on 13.

Q. Was it a good-sized fruit train?

A. Yes, sir, that is a fair sized.

Q. And now when you are down there as an ice helper, do you instruct the Addison Miller employees in any way as to how to do their work?

A. No, sir. I instruct, inasmuch as I bring on the cars, how much salt should go in with the ice, whether it be coarse, chunk or crushed ice. [720]

(Testimony of Lloyd Wright Woolf.)

Q. Do you tell them how to put the ice in or how to put the salt in, the actual operation of doing it?

A. No, I don't instruct the men.

Q. And then how long after going down to the dock, how long did you stay there?

A. Until after the fruit train was finished.

Q. Do you know what time it was finished, approximately? A. Well, roughly around 6.

Q. And then what did you do after the fruit train was iced?

A. I take my information back up to the foreman, because he has got to write all that stuff down on his 1755 form.

Q. And was there any other ice helper with you on that particular day?

A. Yes, there was.

Q. What was his name?

A. Lester Greenwald.

Q. Do you know where he is at the present time?

A. I believe he is in the service, sir.

Q. And now how did you notify the ice foreman that the work was completed, if you did?

A. By telephone.

Q. On what phone? A. Well, on the dock.

Q. You mean the Addison Miller dock? [721]

A. Yes, sir.

Q. And on July 17, 1952, did you call Mr. Williams, the ice foreman, after this train was iced?

(Testimony of Lloyd Wright Woolf.)

A. I imagine I did, sir. I always did on the fruit trains, that was the standard practice.

Q. And then what did you do after that?

A. I took the information up to the foreman.

Q. You took it up to him up at the yard office, is that right? A. Yes.

Q. And at the time you left, was the fruit train still on the tracks at the time you left the dock?

A. Well, yes, sir.

Q. And did you at any time later than evening go back to the Addison Miller dock?

A. Yes, I did.

Q. About what time was that?

A. That was just a few minutes after the accident had happened.

Q. And at any time when you were around the Addison Miller dock before you left, did you see any salt car on Track 13 that was being unloaded?

A. No, sir, I don't recall seeing any.

Mr. Cashatt: You may inquire. [722]

Cross Examination

Q. (By Mr. Gillivray): Mr. Woolf, as I understand, in the performance of your duties you get your instructions from the ice foreman as to what is required in the icing of cars, then you go down to the dock to see that those instructions are carried out? A. Yes, I go down.

Q. That is correct, isn't it? And usually do two of you ice helpers go down to the dock at one time?

A. On fruit trains, yes, sir.

(Testimony of Lloyd Wright Woolf.)

Q. On fruit trains. As I understand this reefer business, Mr. Woolf, sometimes you have a train composed completely of reefers, but other times you might have a train with three or four reefers and boxcars and cattle cars and other types of cars; is that correct? A. Yes, sir.

Q. So on occasions, you will ice a whole train; on other occasions, you might ice one, two or three cars? A. That's right, sir.

Q. When just one car is being iced, does an ice helper go down and check to see that it is properly iced?

A. Yes, sir, we go down to see that the ice and salt is put in, and we also have to poke the drainage to see that the water can escape when it melts.

Q. Now in icing a car, when do you put the salt in? After all the ice is in?

A. It depends, sir, on the amount of ice to be put in.

Q. Well, who determines when the salt is to be put in when it is half full or when it is completely full of ice?

A. Addison Miller have the instructions.

Q. And who gives them those instructions?

A. I think they get them from a Northern Pacific rule book.

Q. Is that the same rule book we have been hearing about? A. I don't know.

Q. Or do you know?

A. I don't know what you have been hearing about.

(Testimony of Lloyd Wright Woolf.)

Q. And you are familiar with how different cars should be iced in different fashions?

A. Yes, I am.

Q. And as a representative of Northern Pacific down on that ice dock, if you saw the crew of Addison Miller icing a car contrary to the manner provided in the rule book, you would immediately stop that procedure?

A. I would tell the foreman.

Q. You would tell him to do it according to the rule? A. Yes.

Q. In other words, you, under the arrangement between [724] Northern Pacific and Addison Miller, had the authority, as an ice helper under the supervision of your ice foreman, to exercise control over how those cars were iced, to see that they were properly iced? A. Well, yes.

Q. Yes. And from time to time, you did exercise that direct control over those operations?

A. I would tell the foreman, yes.

Q. Yes. When anything was going on that you thought was wrong, you would stop it and tell them what to do?

A. I would tell the foreman what to do, yes.

Q. And you have done that? A. Yes.

Q. And, Mr. Woolf, if, let's say, the ice chain bringing up the ice from the tunnel to the top of the dock became clogged because the slush pit was overloaded and overflowing, you, as an ice helper, would immediately give orders that that ice slush pit be cleaned out? A. No, sir, I would not.

(Testimony of Lloyd Wright Woolf.)

Q. You wouldn't?

A. No. That doesn't mean anything to me.

Q. Pardon?

A. That doesn't mean a thing to me, that chain.

Q. Well, doesn't it mean a thing to you as a representative of the Northern Pacific to see that ice continually [725] comes through that tunnel and up on to that dock when you have a fruit train there being iced?

A. That is Addison Miller's job, sir.

Q. Well, and what if the chain became clogged up because the ice pit was overflowing, would you do anything about it?

A. No, sir, I wouldn't.

Q. You wouldn't. What is that?

A. Because it is not my job.

Q. It is not your job. But over all of the other icing operations, you did have authority to and did exercise control and supervision?

Mr. Cashatt: I object to that, the broad term "control and supervision." I think it should be more specific.

Mr. MacGillivray: I think he understands.

The Court: Well, I will overrule the objection.

Mr. MacGillivray: Plain words.

The Court: Can you answer that?

Mr. MacGillivray: Read the question.

A. What was that again?

(The question was read.)

A. No, sir, I wouldn't say yes to that, because all other, no.

(Testimony of Lloyd Wright Woolf.)

Q. Pardon?

A. No, sir, not all other. [726]

Q. Over what part of the icing operations did you exercise direct control and supervision?

A. I only controlled the amount of salt they put in, how large of chunks of ice they put in. Other than that, I didn't.

Q. Assuming that you had a fruit train in there in need of immediate icing and the chain leading through the tunnel stopped; wouldn't you call your ice foreman?

Mr. Cashatt: I object to that as repetition, your Honor. He has answered the question twice already. It is assuming something that is not in evidence in this case.

The Court: Well, overruled.

Mr. Cashatt: It isn't shown it ever clogged.

The Court: You may answer that question.

A. What was that?

Q. (By Mr. MacGillivray): Assuming, Mr. Woolf, that you had a fruit train standing by on 12 and 13 and it needed immediate icing, as you did on the early evening of July 17, 1952, and the chain bringing up ice clogged and no more ice was coming to the top of the dock; would you not call your ice foreman at the Northern Pacific and report that to him?

A. If there was going to be considerable delay or something, I may phone him up to let him know what was the delay. [727]

Q. And if your foreman then gave you some in-

(Testimony of Lloyd Wright Woolf.)

structions, you would carry them out, would you not?

Mr. Cashatt: I object to that, your Honor.

The Court: Well, I will sustain the objection.

Mr. Cashatt: Assuming things.

Q. (By Mr. MacGillivray): Mr. Woolf, you say you went back to the ice dock right after the accident occurred? A. Yes, I did.

Q. Do you remember what time that was?

A. Well, it was roughly around 8 o'clock. I couldn't say for sure.

Q. Wasn't it closer to 9 o'clock?

A. No, it was closer to 8.

Q. Well, it was dark outside, anyway, wasn't it?

A. No, it wasn't dark.

Q. It wasn't dark. Did you see young Gerry Stintzi on the ground down there?

A. Yes, sir.

Q. And did you go up on top of the dock?

A. Yes, sir.

Q. And the white overhead lights on top of the dock were illuminated?

A. I don't recall now whether they were or not.

Q. You don't recall. Did you notice whether this metal plate that was used between a salt car and the salt pit [728] was laying on the ground immediately outside the salt pit?

A. I didn't see one.

Q. Did you look for it?

A. I had no reason to look for it, I didn't.

(Testimony of Lloyd Wright Woolf.)

Q. When you returned, did you look to see whether or not any salt car was there?

A. No, I had no reason to look for one.

Q. This fruit train that you iced, was that down on both 12 and 13? A. Beg your pardon?

Q. The fruit train that you iced between 4 o'clock and 6:10, did you ice both on 12 and 13?

A. I don't recall for sure whether it was on 12 and 13, but it was the general practice.

Q. Pardon?

A. It was the general practice to ice on both tracks.

Q. You don't remember whether it was on 13?

A. On that particular train, I do not remember for sure.

Q. Do you remember what cars were on 13 when you were down there in the icing operation?

A. I don't recall any particular cars.

Q. And did you pay any particular attention to what cars were on 13 when you arrived down there after the accident? [729]

A. I did notice and recall that there were some stock cars when I came back after the accident.

Q. Any other type cars?

A. I don't recall seeing any other, but there may have been there.

Q. How many cars were there?

A. I didn't count them.

Q. Well, the 14 cars to the west when you arrived down there after the accident were not stock cars, were they?

(Testimony of Lloyd Wright Woolf.)

A. I don't know what they were. I saw some stock cars, but I don't know what cars.

Q. Where were the stock cars you are talking about? A. On 13.

Q. Were they to the west of the dock or east of the dock, or just where?

A. Well, along—I believe they were alongside of the salt house there.

Q. And you don't recall the first 14 cars that you passed by in running down there?

A. I didn't come that way, sir, I came through the tunnel.

Q. You came through the tunnel. And then did you go back to the yard office?

A. I stayed there until the boy was taken away.

Q. And then did you go back to the yard office?

A. Yes, I think so.

Q. Back through the tunnel or along the track?

A. I believe I went back through the tunnel, sir.

Q. I see.

Mr. MacGillivray: That is all.

Mr. Cashatt: That is all, Mr. Woolf.

The Court: That is all, then.

(Witness excused.)

Mr. Cashatt: Mr. Miller.

SAM MILLER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): State your name, please.

A. Sam Miller.

Q. And where do you reside, Mr. Miller?

A. 621 South Division.

Q. How long have you lived in Spokane?

A. Well, it will be 38 years in October.

Q. And what is your occupation?

A. Assistant general yardmaster, days.

Q. Is that for Northern Pacific? [731]

A. For the Northern Pacific Railway.

Q. What time do you go to work in the morning?

A. Well, I generally get out there at 6:30; I take over charge of the yard at 7 o'clock.

Q. And how long do you work?

A. On this particular job?

Q. Yes? A. Oh, since about 1938.

Q. And you say you go to work about 7 in the morning and what time do you go off in the afternoon? A. 3 o'clock, 3 p.m.

Q. And on July 17, 1952, Mr. Miller, did you work that shift that day? A. Yes, I did.

Q. And did you go off shift at 3 o'clock?

A. Yes, I did.

Q. Now, Mr. Miller, when you go off shift, do you leave any record of the cars on certain tracks

(Testimony of Sam Miller.)

for the other yardmaster that will come on as soon as you leave? A. Yes.

Q. And is that a daily record that is made every day at the end of each shift? A. Yes.

Q. And was such a record made on July 17, 1952? A. Yes. [732]

Mr. Cashatt: May I ask the witness which page is his writing? That is the one I want to mark.

The Court: Yes, all right.

Q. (By Mr. Cashatt): Mr. Miller, which is your writing that you leave at 3 o'clock?

A. This is mine (indicating). My assistant headed it up, but I filled it out.

The Clerk: I have marked Defendant's 40 for identification.

Q. (By Mr. Cashatt): Mr. Miller, handing you a book with one sheet marked Defendant's Exhibit No. 40 for identification, what is the book that you are now looking at with that page marked?

A. Well, that is the book that each yardmaster that changes shift makes a turnover to the assistant general yardmaster relieving him so as he will know what each track, or the cars that consist on each track, or if the track is clear or if it carries certain cars.

Q. Now looking at the sheet marked Defendant's Exhibit 40 for identification in that book, which is sheet number 6, did you make that sheet up on July 17, 1952 at 3 p.m.?

A. As I stated, my assistant headed it up and

(Testimony of Sam Miller.)

I filled in the places that are filled in here. I left this one open because there wasn't—— [733]

Q. Don't testify off of it, sir.

A. Oh.

Q. That is fine. And does the sheet No. 6 have a notation for Track No. 13, without saying what it is?

A. Yes.

Q. Does it have that notation?

A. Yes.

Mr. Cashatt: Offering Exhibit No. 40.

Voir Dire Examination

Q. (By Mr. MacGillivray): Mr. Miller, this entry, the page marked as Defendant's Exhibit 40, was made out by you sometime prior to 3 o'clock on July 17, 1952?

A. That was made out probably 10 minutes before I went off shift.

Q. And that would show what cars might have been on Tracks 1, 6, 10, 12 or 13 as of 3 o'clock?

A. That is correct.

Q. You don't know what changes were made on Track 13 from 3 o'clock to 4 o'clock?

A. No, I leave there at 3 o'clock.

Q. You don't know what was on there at 4 o'clock?

A. No.

Q. At 8 o'clock?

A. No. [734]

Q. Or at 8:30?

A. No, sir.

Mr. MacGillivray: Object to the exhibit as having no materiality, your Honor.

Mr. Cashatt: Well, your Honor, we want to bring

(Testimony of Sam Miller.)

it up to 3 o'clock, and then the next man will take it on, because Mr. Miller wasn't there, he didn't write the next shift.

The Court: Well, I will admit the exhibit showing the condition at 3 o'clock, it is understood.

Mr. Cashatt: Then, with the understanding, your Honor, that we can take the sheet out and substitute a photostat?

The Court: Yes, you may. As I understand it, only the one sheet has been offered, and then you may substitute copies.

Mr. Cashatt: That's right.

(Whereupon, the said sheet was admitted in evidence as Defendant's Exhibit No. 40.)

Q. (By Mr. Cashatt): Mr. Miller, on your list, Exhibit No. 40, made up about 10 minutes to 3 on July 17, 1952, I [735] see you start with Track 1 and go on down the list. Do you have a notation for Track 13? A. Yes, I have a notation here.

Q. And what is your notation for Track 13?

A. "Icers for 661 & City."

Mr. MacGillivray: I didn't hear that?

Mr. Cashatt: Say it again.

A. "Icers for 661 & City."

The Court: Might have him tell what that is in English.

A. Well, 661 is the number of a train.

The Court: All right.

Q. (By Mr. Cashatt): And "icers," what are "icers?"

A. Those are cars that are placed at the ice dock

(Testimony of Sam Miller.)

to either be re-iced or serviced for movement out of the yard.

Q. And is there any notation there of any salt car being on Track 13 at 10 minutes to 3 on that day?

A. No, sir, or it would have been shown there.

Q. Now showing you Exhibit No. 38, Mr. Miller, do the icers that you have listed—I see this exhibit starts at 3:45 p.m.—the icers that you had listed at 3 o'clock, are there any of those shown on Exhibit No. 38?

A. Well, here is one right here (indicating) because it says stop at Lewiston, and that goes out on this 661 [736] train.

Q. So, then, your Exhibit No. 40 corresponds with Exhibit No. 38, is that right?

A. That is right.

Mr. Cashatt: You may inquire.

Cross Examination

Q. (By MacGillivray): Mr. Miller, I didn't get clear what was on Track 13 at 10 minutes to 3?

A. "Icers for 661"—that is what we call the Lewiston train, that is the number of the train—" & City," which was probably shoved down there, if I can explain to you why the city was shoved in there.

Q. Yes.

A. This train probably come in from the east or west with this icer for Lewiston and there might have been a city load next to it. To eliminate two

(Testimony of Sam Miller.)

switches, we shoved the both of them down on Track 13 until they would ice this car.

Q. Well, an icer is a reefer car, though?

A. That is a refrigerator standing, traveling, under refrigeration.

Q. And how many reefer cars were on Track 13 at 10 minutes to 3? [737]

A. Well, I don't recall right at the present time because that is a long time away. There might have been—the way I got it there, "Icers for 661," there might have been one or two icers.

Q. You don't keep any check of how many icers or refrigerators cars are on the track?

A. When the checker comes in at 3:15, a complete check of the yard brought in at 3:15 each afternoon. Well, there is one brought in at 7:15 in the morning, one at 3:15, and one at 11:15. When the checker would come in at 3:15 in the afternoon, he would bring a complete check of all cars on Track 13 at that time.

Q. I see. And then you, of course, don't know what went onto 13 after 3 o'clock?

A. No, I don't.

Q. You don't know whether any salt car was moved in there at 4 o'clock or at 6 o'clock or at 7 o'clock?

A. No, I don't, because I went home at 3.

Q. The only place they put the salt cars is on Track 13, isn't it?

A. No, we have salt cars in storage down in what we call the backyard, and we have them on

(Testimony of Sam Miller.)

what we call Track 9, and when the ice foreman will issue me an order and lay it on my desk and say spot car such and such at ice dock, salt car for unloading, if the track is in such a [738] condition that we can spot it, we will spot it. If not, we will just tell them that we will have to wait until we clear the track so we can spot the car so the track can be blue flagged and the engine foreman notified.

Q. And sometimes you will spot a salt car on Track 13, it will be partially unloaded, and then you move it for one reason or another before it is completely unloaded?

A. If the car is not completely unloaded, the ice foreman will tell us. We then remove the car and place it at a convenient track in the yard, which is No. 9, so we can use the track, and then when the opportunity permits again, we put it back there for them to finish unloading.

Q. In other words, a salt car might be in and out of the salt mine location on Track 13 two, three or four times?

A. Not over twice, two times.

Q. Not over twice, not over what?

A. Two times, twice.

Q. Not over two times. Well, it might be in there and out and back again before it is completely unloaded? A. That is correct.

Q. And the only place you do unload salt cars is on Track 13? [739]

A. That is correct.

(Testimony of Sam Miller.)

Q. Do your records show whether there was a salt car on Track 13 on July 16, 1952?

A. Well, let's see, the 16th, July the 16th, let's see. One car of salt on the 16th, that is on the 16th, one car of salt.

Q. And that was at 3 o'clock?

A. Well, now, let me get this straight here. That would be at 3 p.m., yes.

Q. At 3 p.m.?

A. There is the time up here (indicating).

Q. And your records don't show whether that car was completely unloaded on the 16th before it was moved?

A. Well, it wasn't there in the morning of the 17th when I came to work.

Q. Well, but you don't know whether it had been complete unloaded on the 16th?

A. Oh, no, I don't know.

Q. In short, was that a full car of salt?

A. Well, I presume it was, yes. I am just guessing that it was a full car of salt. It might have been a partial car to finish unloading.

Q. Do you know how many sacks of salt a freight car holds?

A. No, I don't, I really don't.

Q. And it is entirely possible, is it not, that the salt [740] car that was there on July 16th was not completely unloaded and was moved back sometime on the 17th?

A. Well, there would be something in the book showing here on my turnover of the 17th that the

(Testimony of Sam Miller.)

car was replaced, or on the morning it would show here at 7 a.m. that the car had been placed back to finish unloading on 13. Now here is what he says, "City icers," in the morning.

Q. Yes.

A. All right, cars being iced to go downtown. All right, there is no indication that there is salt in there at this time. That is one thing—

Q. That is as of what time, 7 o'clock in the morning?

A. That is 7 o'clock. That is one thing we are very particular about is those salt cars, because we have got to protect those men while they are—what I mean by that, everybody is notified, including the engine foreman, that they are unloading salt on Track 13, and that is instructions that is specifically put out for us to notify all foremen so there would be no cars kicked in on that track.

Q. Those precautions are taken, is that true?

A. Those precautions are taken and have been taken.

Q. Yes. Then on the 17th, where you show icers on Track 13 at 3 o'clock, does that mean that those icers had been there from when you came on duty at 7 o'clock [741] until 3 o'clock?

A. Oh, no, those icers that shows in the morning shift here were removed by some engine and taken down to Erie Street, and these were new cars replaced anywheres from 9 o'clock in the morning until up until I went home.

Q. Well, do you know what other cars, other

(Testimony of Sam Miller.)

than these icers for Lewiston, had been on Track 13 between 7 o'clock and 3 o'clock?

A. Oh, I don't recall that. I might have built a train up in there in the meantime.

Q. And there might have been salt cars in there in the meantime?

A. No, there wouldn't be salt cars in there if I built a train in there.

Q. If you at any time didn't have a train in there, there might have been salt cars?

A. If there were, they would show on the turn-over when I left at 3 o'clock.

Q. Not unless they were still there at 3 o'clock?

A. If they were still there at 3 o'clock, they should show there.

Q. If they weren't still there at 3 o'clock, or having been moved, it wouldn't show on this record?

A. It wouldn't show on there.

Q. The only thing this record shows, Mr. Miller, is what [742] was there at 3 o'clock and not what had been there during the day?

A. That is correct.

Mr. MacGillivray: That is all.

The Court: Any other questions?

Mr. Cashatt: That is all, Mr. Miller.

(Witness excused.)

Call Mr. Craig.

BOYD Q. CRAIG

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name is Boyd Craig? A. Yes, sir.

Q. And where do you reside, Mr. Craig?

A. North 2714 Perry Street.

Q. How long have you lived in Spokane?

A. About 42 years.

Q. And married? A. Yes, sir.

Q. Family? A. Yes, sir.

Q. By whom are you employed? [743]

A. The Northern Pacific Railroad.

Q. And how long have you been employed by the Northern Pacific Railroad?

A. Since January 15, 1945.

Q. In July, 1952, were you working at the Yardley yards of the Northern Pacific at that time?

A. Yes, sir.

Q. And what was the nature of your job at that time? A. Switching.

Q. What time, Mr. Craig, did you come to work that day?

A. Well, I started to work at 3:15. It was probably about 3 o'clock that I got to work.

Q. And then did you work the 3 to 11 shift?

A. From 3:15 until 11:15, yes, sir.

Q. Do you recall, Mr. Craig, between, oh, say, 3 o'clock and 7, what you were doing out there?

A. Well, not particularly, just working around

(Testimony of Boyd Q. Craig.)

the yard switching one set of cars or another. We were working at all times.

Q. How was the activity in the yard during that particular day?

A. Well, I don't recall particularly. When we were out there, we are usually hitting the ball all day along or the whole shift.

Q. And by that, do you mean moving cars continually, making [744] up trains, breaking up trains, and so on? A. Yes.

Q. Now were you a member of a crew of which Mr. Prophet was the switch foreman?

A. Yes, sir.

Q. And who else were members of that crew?

A. There was Prophet was the foreman, and Johnny Morton was the man following the engine, and I was working the field.

Q. When you say the man following the engine, what do you mean?

A. Well, he is the man that lines the switches ahead for the engine, and then after that is all done, why he works towards the engine from the foreman. He is the one that pulls the pins on the cars.

Q. And you say you were the field man?

A. Yes, sir.

Q. What is the field man?

A. Well, the field man is the man that lines the switches, each switch for each individual cut or each individual car is going to. You work away from the train from the foreman.

(Testimony of Boyd Q. Craig.)

Q. And when you say you work away from the train, what do you mean by that?

A. Well, away from the cut of cars. The foreman, he is [745] usually at the end of the cut of cars, where he instructs the engine follower as to how many cars is going to be cut off, and, of course, I am down below that and I am the one that throws the switches where these cars are supposed to go.

Q. Now when you are working on a switch crew out there, where do you get your orders as to what cars to move around in the yard?

A. From the yardmaster on duty.

Q. And then the crew carries out the orders given you, is that right? A. Yes, sir.

Q. Now do you remember, Mr. Craig, of receiving some orders to pick up 14 cars on Track No. 43?

A. Yes, I do.

Q. And about what time would you say you received those orders?

A. Well, I would say it was, oh, possibly 7:30 or 7:45.

Q. And then did you go over and get those cars?

A. Well, Mr. Prophet, he went down and got the cars and I stayed up beyond the switch where he went in, the 42 Switch, I stayed up beyond that. The cars were set in there.

Q. A little louder, please?

A. The cars were all in there altogether, and he just [746] backed in with the engine and coupled onto them and started pulling them out.

(Testimony of Boyd Q. Craig.)

Q. And then where did you take the cars?

A. Well, coming out of 42, you go onto a track that is the outbound track from the round house for engines coming out of the round house come up and then onto the Old Main.

Q. Would it help any if you show us that over here?

Mr. Cashatt: I just wonder, can the jury see this at all down here? I hate to take the time to put it up.

Q. Mr. Craig, step over on this side, please, so you won't be in the way.

Mr. Craig, I don't believe you have seen this exhibit, Defendant's Exhibit No. 1. A. No.

Q. Please take a look at it and kind of get it in mind. The yard office is located on the west end, and the evidence is that the red line running down here (indicating) goes onto Track 13. Do you recognize that? A. I recognize that.

Q. And some notations of Tracks 42 and 43 up above toward the northern part of the map, see that all right? I might ask, Mr. Craig, do you understand that? A. Yes, I do.

Q. Do you know your directions? [747]

A. Yes, this is west, this is east, this is north, and down is south (indicating).

Q. That is fine. Keep your voice up, please, so that everyone can hear.

Now you say that you got the cars on Track 43 and pulled them over to the Old Main, is that right?

(Testimony of Boyd Q. Craig.)

A. Yes, here is Track 43 (indicating), got them here, come out here onto this outbound.

Q. Louder.

A. The outbound round house lead, up through here, and straight along this way and out in here onto the Old Main. This is the Old Main (indicating).

Q. All right, keep your voice up. What portion of the Old Main is designated in red there? Will you point that out?

A. The Old Main would be right along in here (indicating). That would be part of the Old Main, I imagine, but this here, my understanding, along in here, that is the working lead.

Q. And on the map, can you see the location of Switch 13? Do you see that?

A. That would be the switch right there (indicating).

Q. And please keep your voice up, Mr. Craig, so all the jurors and his Honor can hear you.

A. I'm sorry. [748]

Mr. McKevitt: That has never been marked on the map, has it, Switch 13?

Mr. Cashatt: It has, I believe, yes.

Mr. McKevitt: All right.

Q. (By Mr. Cashatt): Now, Mr. Craig, when Mr. Prophet picked up the cars, as you said, on Track 43, what was your course from the time those cars were coupled to the switch engine? Just trace where you went after that.

A. Well, I was out approximately about here

(Testimony of Boyd Q. Craig.)

(indicating), and when you come out of this switch for 42 and 43, this is a round house lead, that switch has always to be lined behind so the engines coming out of the round house couldn't go through it. So I stayed here to see whether Prophet lined the switch when he come out. If he hadn't of, why I would have went down to line the switch back to the round house lead again. And, of course, when the cars come out here and Prophet had lined that switch back, when he tied into these cars on 43 and started out with them, he cut across and lined 13 Switch. He had gone to 13 Switch, then he went back. When the last car come out 43 here, well, he got on to it and he dropped off there to line the switch and then again caught the cars again and went up here to the Old Main. And I had stayed approximately [749] right here at this switch here where you can glance down the Track 13.

Q. And did you see Mr. Prophet line Switch 13?

A. Yes, I did.

Q. And then where did you stay after Mr. Prophet lined Switch 13?

A. I was right over here where I could look down 13 Track.

Q. And from where you were standing, Mr. Craig, did you have a clear, unobstructed view down Track 13 to the east?

A. Yes, sir, I did.

Q. From where you were standing, could you see the Addison Miller dock?

A. Yes, sir.

Q. When this movement started, did you know

(Testimony of Boyd Q. Craig.)

on what track the 14 cars were going to be put in on?

A. They were going to be put in on 13, yes, I understood that.

Q. And from the time that this movement started, tell us what attention you paid to Track 13, if any, before Prophet threw the switch on for Track 13?

A. Would you state that again, please?

Q. While you were in the area that you have told us, before Mr. Prophet moved Switch 13, did you look down [750] Track 13 at the Addison Miller ice dock?

A. Yes, sir, I did.

Q. At that time did you see any blue light on Track 13?

A. No, sir.

Q. At the Addison Miller ice dock?

A. No, sir.

Q. At the time Mr. Prophet turned Switch 13, did you look at the Addison Miller ice dock at that time?

A. Yes, sir, I did.

Q. And what were you looking for?

A. Looking for a blue light.

Q. Did you see one?

A. Never saw one, no, sir.

Q. Did you see any blue light on Track 12?

A. No, sir.

Q. And then did you remain in a position where you could observe the Addison Miller dock after Prophet had turned the switch?

A. Yes, I did.

Q. Now how long, Mr. Craig, was it between

(Testimony of Boyd Q. Craig.)

the time that Mr. Prophet moved Switch 13 until the cars were actually set in motion down Track 13?

A. Well, offhand I wouldn't say directly, but I would imagine it would have been about three minutes to pull those cars up and throw this switch so they could go [751] down the main.

Q. Were you tied up by anything else while you were making this switch that you recall?

A. Not that I recall.

Q. And did you keep a continuous lookout toward the Addison Miller dock at all times before the cars, the 14 cars, started going down Track 13?

A. Yes, sir.

Q. And at any time during that period of time, did you see any blue light on either Track 13 or Track 12 at the Addison Miller dock?

A. No, sir.

Q. Now, then, did the 14 cars go on past you to the east? A. Yes, they did, down this lead.

Q. And at that time, Mr. Craig, when was the last you saw of those cars?

A. Well, after they had gone around past the switch here and headed toward 13.

Q. Was that after they had uncoupled the cars from the engine? A. Yes, sir.

Q. And when they were crossing Switch 13 and going down Track 13? A. Yes, sir.

Q. Were you in a position, Mr. Craig, while those cars were [752] going across Switch 13 and down Track 13 that you could have stopped those cars if you had seen a blue light at any time?

(Testimony of Boyd Q. Craig.)

A. Yes, sir, while they was going past me, I could have, and I believe I could have caught them if I had to later on.

Q. Just be seated.

Mr. Craig, if any blue light had been observed by you while those cars were going to the east, how would you have stopped them?

A. By climbing aboard the cars and tying down a hand brake, applying a hand brake.

Q. What do you mean by that, "tying down the hand brake?"

A. Well, on the end of each car there is a large wheel, that by turning the wheel it applies the brakes on the car.

Q. Then what did you do, Mr. Craig, after these cars were switched on Track 13?

A. I went to the yard office and we went to lunch. We tied up for lunch.

Q. And what time did you return?

A. It was about, oh, 8:35, I imagine.

Q. And was it then when you heard of the accident?

A. Yes.

Q. Now was it customary during the time that you worked in [753] the yard, Mr. Craig, that switches of cars on Track 13 were made in the same manner as the one you have just told us about on July 17, 1952?

A. Would you state that again, please?

Q. While you worked in the yard before this day, July 17, 1952, had you made other switches on Tracks 12 and 13 in the same manner as you made

(Testimony of Boyd Q. Craig.)

this switch you have just told us about on the evening of July 17, 1952?

A. Yes, sir, if there wasn't a blue light on the track, we operated that way all the time.

Q. Did you ever make a switch like that when there was a blue light on either Track 13 or Track 12?

A. Absolutely not.

Q. In carrying out your duties in this switchyard, how many of those switches, as you have told us about where the cars are uncoupled and permitted to roll down the track, would you say that you make in an 8-hour shift?

A. Well, that is a yard question to answer. It just depends on the business, that is, the trains in the yard or just how full the yard is with cars that need to be switched.

Q. Well, do you make several of those on each shift?

A. Oh, yes.

Q. Can you give me any idea about the average number?

A. Oh, I couldn't give you a number. [754]

Q. Now do you know from your experience out there before July 17, '52 what Track 13 was used for?

A. It was used for trainyard track.

Q. And when you say trainyard track, what do you mean?

A. Well, to run trains in and out and to store cars on.

Q. And was Track 12 used for the same purpose?

A. At times I have seen it used for that purpose.

(Testimony of Boyd Q. Craig.)

Q. Now, Mr. Craig, on the night of July 17, 1952, when this switch was being made, what was the weather condition that night?

A. It was clear.

Q. And was it dark or dusk?

A. It was just getting dusk.

Q. Getting dusk? A. Uh-huh.

Q. At the time you were standing there watching the Addison Miller dock, did you see any white lights on the dock, on the Addison Miller dock?

A. There was some white lights over on 12, on the 12 side of the dock.

Q. And which is the 12 side?

A. The south side.

Q. Did you notice any lights on the 13 side, the north side; that is, before you switched these cars?

A. The 13 side, to my knowledge, was dark.

Q. Now when you see lights, either on the 12 side or on the 13 side, white lights, does that mean anything to you as far as the work going on at the Addison Miller dock?

A. Not unless there is a blue light on the dock.

Q. At any time between 3 o'clock, when you came to work, and 8:20 in the evening, when you went to lunch, had you spotted any salt car on Track 13? A. No, sir.

Q. Had you at any time during that period from 3 o'clock to 8:20 p.m. on that day pulled any salt car off of Track 13?

A. To my knowledge, no.

Q. Well, Mr. Craig, when these 14 cars that you

(Testimony of Boyd Q. Craig.)

have told us about were being put on Track 13, were there any cars on Track 13 at that time?

A. Yes, there were cars down on 13.

Q. Did you know what cars those were or anything?

A. No, sir.

Q. Who had that knowledge?

A. The yardmaster would have that knowledge.

Mr. Cashatt: You may inquire. [756]

Cross Examination

Q. (By Mr. Etter): Mr. Craig, would you mind stepping down and taking this red pencil and marking on the chart where you were standing as the switch movement was passed? Would you mark it up there where you were?

A. Here (indicating), there is supposed to be a double switch right in here, one for the shanty track and toward this pocket yard, and it would have been right in here (marking on exhibit).

Q. You were standing there when the switch movement started?

A. Yes, sir.

Q. That is, with reference to bringing the cars over from Track 43 onto Old Main before you took them down the Old Main off on the lead down 13?

A. Yes, sir.

Q. Is that right. Will you put your initials "B.C." on there, Mr. Craig?

A. (Witness complies.)

Q. And did I gather you brought them down to the Old Main on this line? What track is that?

A. Well, that would be the lead going to the

(Testimony of Boyd Q. Craig.)

pocket yard or the lead for the round house tracks.

Q. All right. What you did, you came off 43 down this lead [757] to the Old Main, is that right?

A. Well, let's see. You don't touch that, it is right up in here is where that that takes off toward this pocket yard.

Q. All right, how did you come onto the Old Main? A. Well, it is right out——

Mr. Cashatt: Speak up now.

A. Right out of 43 up to here (indicating), right along there, and right onto the Old Main.

Q. (By Mr. Etter): That is how you got in there? A. Yes.

Q. All right. Now when you got to the Old Main, were the string of cars pulled right up in front of the yard office? A. Yes, sir.

Q. And how long were you there in front of the yard office?

A. As I recall, not more than a minute.

Q. Not more than a minute?

A. As I recall.

Q. Are you sure of that?

A. Well, ordinarily, we wouldn't hang on to the cars for any other reason unless we happened to be blocked, and I don't remember whether we were blocked at the time or not.

Q. Well, as I gather what you are testifying to, Mr. Craig, [758] is that you picked these cars up and you brought them down, as you have indicated, past the switch signal, below the switch signal which carries your initials "B.C.," down to the Old

(Testimony of Boyd Q. Craig.)

Main which is indicated on the map in front of the yard office, and you stopped there not more than a minute and you began your switch movement; is that it? A. Yes, sir.

Q. I think in your direct testimony you said you started up in here (indicating), there was only three minutes involved in pulling 14 cars down along that track past your initials down to the Old Main in front of the yard office and beginning the switch movement, three minutes; is that right?

A. That's right.

Q. So that I gather that from the commencement of the movement of bringing the cars, the 14—there were 14, weren't there?

A. Yes, sir.

Q. —the 14 cars off 43, from the moment that you started the movement off of 43 until you started to take them onto the lead and down to 13, that involved the elapse of only three minutes?

A. Yes, sir.

Q. Now, Mr. Craig, after the movement started—I am [759] referring now to the movement out of the Old Main onto the lead and down to Track 13 north of the icing platform—where were you standing when that movement started?

A. Right at this point right here (indicating).

Q. You were still here when the movement started from the Old Main down this way?

A. Yes, sir.

Q. And that is approximately, if you take a look here—

(Testimony of Boyd Q. Craig.)

Mr. Cashatt: Well, now, I object to that. That isn't drawn to scale there, the top part there.

Q. (By Mr. Etter): All right, how many feet were you from the Old Main on this switch? How far were you from the Old Main?

A. Possibly that would be from the working lead, that wouldn't be the Old Main.

Q. All right, from the working lead. The working lead, as I get it, is the first switch off of Old Main? A. Well, that would be your 8 Switch.

Q. All right, that is your working lead.

A. From there all the way down to the working lead.

Q. Where were you at the nearest point from the working lead?

A. I would say about 40 feet.

Q. About 40 feet. And you were there when the switch [760] movement started? A. Yes, sir.

Q. All right, then what did you do?

A. I stayed in this position until I saw the cars going down around the bend into 13, watching for a blue light.

Q. You stayed here? A. Yes, sir.

Q. Until these cars went down around this bend, is that the idea? A. Yes, sir.

Q. Watching the blue light? A. Yes, sir.

Mr. McKevitt: Watching for the blue light.

Mr. Etter: Watching for the blue light.

Q. All right, when the movement of the train went down through Switch 13, how far were you away from Switch 13?

(Testimony of Boyd Q. Craig.)

A. Well, it would be six or eight car lengths away from the 13 Switch.

Q. Six or eight car lengths? A. Uh-huh.

Q. In other words, 240 to 320 feet, approximately? A. 220, yes.

Q. About 100 yards? [761] A. Well—

Q. Approximately? A. Yes, 40-foot cars.

Q. All right. And would you say that was the position you were in when the last of the 14 cars crossed over the switch onto the 13 Track?

A. Yes, sir.

Q. Now assuming that you were in this position over here when these cars came over this switch onto 13 and the blue light was snapped on down here, is it my understanding that you could have stopped those 14 cars?

A. Not at that point when the cars were in there, the cars were delivered on the track then. After they had got off of the lead, they were in on their track.

Q. Well, I know, but I thought you said you could grab a hand brake or something and stop them?

A. I mean when the cars were going by here (indicating), I could have got a hand brake.

Q. When they were going by here?

A. Yes.

Q. But you couldn't when they got down to this switch and started around that switch, you couldn't have stopped those cars then if you had got a light down here, could you? A. No, sir. [762]

(Testimony of Boyd Q. Craig.)

Q. Beg pardon? A. No, sir.

Q. And so far as this particular switch movement is concerned, from at least when the cars were at Switch 13, from there, that point, down to the salt house, there was no control that you could exercise over those cars at all, was there?

A. No, sir.

Q. Do you know what the distance is between the icing platform and 13 Switch?

A. I would say it was about possibly 16 car lengths.

Q. 16 car lengths. 840 feet, 40-foot car—640, is that it? A. 640.

Q. 640. You may have heard it testified that the distance from the salt house up to the yard office is about 2,050 feet. Now effecting that comparison, just trying to get it right, in other words, from the salt house here to the yard office, 2,050 feet; this is your 13 Switch; this is drawn to scale of one inch to 20 feet; would you revise that estimate after looking at that now as to the distance between the 13 Switch and the salt house?

Here we are back here (indicating). Now it has been testified by your man, your engineer, that it is [763] approximately 2,050 feet from that yard office down here to the icing platform. Here is the No. 13 switch. Now would you revise that estimate of the distance from 13 down to that salt shed after looking at that, Mr. Craig?

A. Well, I am no judge of distance. You asked me the question.

(Testimony of Boyd Q. Craig.)

Q. But I mean looking at this chart, isn't it quite obvious that it is a lot longer between the salt shed and 13 and the yardmaster's office?

A. Yes, it is.

Q. And if that is 2,050 feet, then this switch would be well over 1,000 feet, wouldn't it, from the salt shed? A. Yes, it would.

Q. Well over 1,000 feet.

Mr. MacGillivray: 1,200 feet.

Mr. Etter: 1,200. Is it 1,200?

Q. All right, Mr. Craig.

(Witness resumed stand.)

Mr. Craig, do you recall that on July the 19th of 1952 you had a talk or a discussion about the circumstances surrounding this accident referring specifically to your switching duties on the night of the 17th of July, 1952, with Mr. Thomsen, the claim agent for the Northern Pacific? [764]

A. I don't believe I spoke to Mr. Thomsen about it, I believe there was another claim agent.

Q. There was another one?

A. Another claim agent.

Q. Was the name of the other claim agent, McNew?

Mr. McKevitt: McGrew.

A. McGrew, I believe.

Q. (By Mr. Etter): McGrew, some such name, do you recall? A. I believe it was McGrew.

Q. Yes. Do you recall whether or not you told Mr. McGrew that you or your foreman Prophet had pulled 14 cars out of Track 13, and then had

(Testimony of Boyd Q. Craig.)

walked to the 13 Switch, that he had lined it for Track 13, and that that took place about 8 o'clock? Did you then tell him that you pulled onto the Old Main and were tied up there for about 10 minutes by another engine before you cut the cars loose?

A. I don't believe I said that in my testimony or in my report to Mr. McGrew. I don't recall that in the testimony.

Q. Well, did you give Mr. McGrew a statement, do you recall, in which you said that?

Q. I gave Mr. McGrew a statement, but that wasn't in the statement.

Q. You are sure it was not in the statement?

A. I'm pretty positive it wasn't.

Q. Well, let me ask you if you made this statement: "We pulled onto Old Main and were tied up for about 10 minutes by another engine before these 14 cars were cut loose?"

A. Well, if I signed that statement, that was fresh in my mind when he took that statement.

Q. Well, then, actually, it is the fact, isn't it, that you were parked out there in front of the yardmaster's office for about 10 minutes after you moved the cars over onto the Old Main? Is that the fact?

A. If it was in my testimony, it is.

Q. Well, here is a copy of the part that I am referring to that was given to us by counsel for the Northern Pacific, and I will just direct your attention to these last three lines right here, Mr.

(Testimony of Boyd Q. Craig.)

Craig, just so that we can refresh your recollection.

A. Yes, that was my testimony then.

Q. Is it your best recollection, Mr. Craig, that that was probably right, that you were there for about 10 minutes?

A. Yes, sir.

Q. Now during the time that those 14 cars were being held in front of the yard master's office for a period of 10 minutes, as you have indicated, were you then standing [766] over on Track 8 or 9?

A. Well, during that time, I was between the place where I designated on the board there and approximately at the 9 Switch, right in that distance.

Q. Beg pardon?

A. Approximately in that distance, between that place where I showed you on the map.

Q. And where?

A. And then the 9 Switch.

Q. Well, you stayed, though, as I gather it, in this position which you have indicated up above the Old Main, as indicated by your red mark, you stayed there while the cars were kicked loose and down Old Main and onto the lead and down through the switch; you were there at all times?

A. While the cars was being kicked into 13, I was at that point.

Q. And you were there when they went past the Old Main and on the lead?

A. Yes, sir.

Q. And you were there while they passed by in front of you?

A. Yes, sir.

(Testimony of Boyd Q. Craig.)

Q. And you were there when they went onto Track 13? A. Yes, sir. [767]

Q. Some 40 feet away in approximately that position, and you were there for the purpose of looking down, as I gather, to see if there was a blue light? A. Yes, sir.

Q. Well, now, Mr. Craig, didn't you tell Mr. Thomsen or Mr. McGrew on July 19, 1952, that when Prophet saw that the switch at 13 was lined for Track 13, he had the man following the engine cut the 14 cars off the engine. "I was between Track 8 and 9 and watched the cars come by me. They were moving very slowly down at slight down-grade of the lead." Did you tell him that?

A. That's right, I was right there at that switch that is between 8 and 9.

Q. Where were you standing?

A. In a place where I marked on the map.

Q. It is between 8 and 9?

A. It is approximately right north of 9 Switch.

Q. Would you step down here again, please?

Step up here, Mr. Craig. These tracks are numbered here. A. Yes, sir.

Q. This is 8 and 9, isn't it? A. Yes, sir.

Q. All right, now, can you tell us where you would be if you were standing between 8 and 9 when the cars went by [768] you? What do you mean by that?

A. I was right at this point here (indicating). That is just about north of N. 9 Switch.

(Testimony of Boyd Q. Craig.)

Q. Well, you didn't mean that you were standing down here between 8 and 9 (indicating)?

A. No, no.

Q. As they went past you?

A. Of course not.

Q. Beg pardon? A. Of course not.

Q. You were standing up in here. What was this position, how would you describe it, so we know what track that is?

A. Well, that is—one switch is off of the shanty track that runs right directly in front of the yard office, and the high switch is for the pocket yard.

Q. Well, then, you were really standing up by the switch that goes to the shanty yard and the pocket yard; you weren't standing between Tracks 8 and 9?

A. No—well, that is 8 there (indicating). I didn't mean I was standing in the track, when you speak of that; I told him that I was right opposite the 9 Track.

Q. I see, all right. Did you go to lunch with Mr. Prophet? A. Yes, I did.

Q. You did. [769] A. Yes.

Q. After the cars started over the 13 Switch or over the switch, the 13 Switch itself, onto Track 13, did you continue to look down for a blue light?

A. After the cars had gone into the 13 Track, I headed for the yard office.

Q. You headed for the yard office?

A. Yes.

Q. In other words, if the blue light had gone on

(Testimony of Boyd Q. Craig.)

after they got over the switch, you wouldn't have seen it, anyway? A. Maybe not.

Q. Well, the fact is you wouldn't, would you?

A. No, sir.

Q. Now when you looked down, as I gather your testimony, Mr. Craig, you saw no blue light on Track 13 and no illuminated lights along Track 13, is that right? A. Yes, sir.

Q. Well, what did you see on Track 13, if anything?

A. I saw cars down in the track aways.

Q. You saw cars in the track? A. Yes.

Q. And that was just prior to 8:20, wasn't it?

A. That was approximately 8:15, 8:20, yes. About 8:15.

Q. Wasn't it dark?

A. It was just dusk. [770]

Q. It was just dusk? A. Dusk.

Q. You could see the cars? A. Yes, sir.

Q. You could see the cars, freight cars, down there, but you couldn't see any illuminating lights?

A. No, sir.

Q. And it was light enough, I gather, that you could look down a thousand feet or more, 1,200 and some feet, and as I gather it, you were some distance even away from Switch 13 when you were over here standing where you say you were?

A. Yes, sir.

Q. How far were you from Switch 13?

A. Oh, let's see——

Q. You said you were 40 feet from the Old

(Testimony of Boyd Q. Craig.)

Main, I think. Now how far were you from Switch 13?

A. About six car lengths.

Q. Six car lengths. You were about——

A. About eight car lengths.

Q. You were about 320 feet? A. Yes, sir.

Q. So you were about 1,600 feet away from the icing dock, it was 1,600 feet down the track from you?

A. Yes, sir. [771]

Q. And you could see cars down there even though it was dusk or almost dark?

A. Yes, sir.

Q. And you could see that despite the fact there were no lights along the side of No. 13?

A. Yes, sir.

Q. You saw lights, however, along the side of 12?

A. Yes, sir.

Q. What were they doing along 12 there?

A. Well, there was no activity on 12 or 13 that I could see.

Q. No activity on 12 or 13?

A. Just the lights were on on 12.

Q. Were there cars in alongside on Track 12?

A. I don't recall.

Q. You don't recall?

A. I don't recall that there was any in there. I wasn't looking for cars on 12.

Q. Well, but you were looking for them on 13?

A. Yes, sir.

Q. And why was that?

A. Well, just to see that the cars—well, I don't know. When you dump cars into a track, you see

(Testimony of Boyd Q. Craig.)

what you have got ahold of, whether the car is going to hold it or whether they are going to hang out on the lead. [772]

Q. Why were you looking for cars on 13? What is your answer to that? You say you weren't looking for them on 12 but you were on 13. Why?

A. I wasn't looking for the cars, I just happened to see the cars there.

Q. You happened to see them? A. Yes.

Q. And you happened to see them accidentally, although there were no lights and although it was 8:15 or 8:20 and you were 1,500 feet away, you just accidentally saw those freight cars on Track 13; is that correct?

Mr. McKevitt: Object to the form of that question, argumentative.

Mr. Etter: Cross-examination.

The Court: Overruled.

A. The cars in there were immaterial to me, there was just cars in there.

Q. (By Mr. Etter): But what I am trying to get at, you happened to see them even though the lights were out?

A. I saw that there were cars in there, yes, sir.

Q. And on the other side, that is, on Track 13, you saw the lights along but noticed there were no cars?

A. Not on—you mean 12?

Q. On 12, you noticed there were no cars on 12?

A. I didn't say that, I said I didn't pay any

(Testimony of Boyd Q. Craig.)

particular [773] attention, I had no dealings on 12 at all.

Q. That's right. You say you don't remember, is that right?

A. Whether there was cars in there or not was immaterial. We had no cars for 12 so I wasn't looking in there.

Q. Well, are you sure that the row of lights wasn't on Track 13 and not on Track 12? Are you certain, Mr. Craig, that this row of lights wasn't on the same side as where you saw these cars?

A. To my recollection, the 13 side was dark.

Q. The 13 side was dark. And is that where you could see the cars? A. Yes.

Q. The 12 side was light, but you didn't notice whether there was any cars? A. Yes.

Q. Is that correct? A. Yes.

Q. Was there a blue light on 13?

A. No, sir.

Q. Was there a blue light on 12?

A. No, sir.

Q. There was not? A. No, sir.

Q. You have been switching out there how many years? [774] A. Since January, 1945.

Q. January, 1945? A. Yes, sir.

Q. And you have switched there in the summer-time? A. Yes, sir.

Q. When is the height of the activity around the ice dock, when does it start, Mr. Craig?

A. Oh, maybe the latter part of July.

Q. In July? A. The latter part of July.

(Testimony of Boyd Q. Craig.)

Q. It continues through what date?

A. Through August.

Q. Through August. And is that the high point of the shipments of perishables in your yard? I mean, in your experience switching, you see more activity then? A. I would say yes.

Q. You would say yes. And, ordinarily, is it a fact that when there is activity down there, the lights are illuminated on the dock? A. Yes.

Q. I mean, that is an indication to you that there is some activity when the lights are on, isn't that so?

A. I have seen lights on the dock where there wasn't anybody working.

Q. Taking a breather or taking 5? [775]

A. Could be.

Q. Could be. But they run three shifts there, don't they, during the summer, usually?

A. I believe they do.

Q. They do. And those lights are on a considerable part of the time? A. Yes.

Q. And cars are iced and freight is shipped in and out of there 24 hours a day during the busy season? A. Well, it could be.

Q. Isn't that correct?

A. Well, at intervals, different times, there is cars in and out of there.

Mr. Etter: That is all.

The Clerk: I have marked Defendant's 41 for identification.

(Testimony of Boyd Q. Craig.)

Redirect Examination

Q. (By Mr. Cashatt): Mr. Craig, Mr. Etter picked out parts of a statement that you had given to the claim man McGrew. Is that the original statement that you signed at that time?

A. Yes, sir.

Q. Is that your signature at the bottom?

A. Yes, sir, it is. [776]

Q. And what Mr. Etter was referring to was a copy of this, is that right?

A. I believe it is, yes.

Mr. Cashatt: Offering Exhibit No. 41 is evidence.

Mr. Etter: No objection.

The Court: It will be admitted.

(Whereupon, the said statement was admitted in evidence as Defendant's Exhibit No. 41.)

Mr. Cashatt: May I read the same to the jury, your Honor?

The Court: All right.

Mr. Cashatt: (reading)

"Statement of B. Q. Craig, age 42, married, address 2714 N. Perry, Spokane, Wash., phone GL 8123, occupation switchman, in service with N. P. Ry. Co. since 1945, made in connection with injuries to Gerald Stintzi, icehelper, Addison-Miller Co., Yardley, Wn., July 17, 1952 at about 8:15 p.m. I was field man on the 3:15 p.m. Yardley switch job, on July 17, 1952 and was on duty between 3:15 p.m. to 11:15 p.m. on this date. Prophet [777] was foreman, Morton was following the engine and we

(Testimony of Boyd Q. Craig.)

had engineer Pilik and fireman Wynn Jr. I know nothing about this accident other than that it occurred and I never at any time saw the injured man or went to the scene at any time. As I recall right after fruit train arrived which came in about 5:30 p.m. this day our crew went into Track 13 and picked up two cars for Lewiston—two for the city and with about four other cars and this then left the track clear. As I recall we did not later put any cars in this track until the time we let 14 cars drift into this track from off the lead. Foreman Prophet had gone in to track 43 and pulled out 14 cars and then he had walked to No. 13 switch and lined it for track 13 as he intended to put these 14 cars in this track. This was taking place at about 8:00 p.m. We pulled onto old main and were tied up for about 10 minutes by another engine and then before these 14 cars were cut loose, I walked over to where I could look down 13 track and there saw no blue light and therefore believed the track clear. In fact there was no light showing at all on track 13 and I did not see any men working on track 13. I looked down and did [778] see some cars on track 13 and they appeared to be at about the middle of the dock. Not seeing any blue light or anyone working around track 13 I assumed that it was clear, account it is the practice and custom that when the ice dock people are working at the dock on track 12 or 13 the blue light would be on and then we would give it blue light protection. I assumed no one was working on track 13. When Prophet saw

(Testimony of Boyd Q. Craig.)

that the switch at 13 was lined for track 13 he had the man following the engine cut the 14 cars off of the engine. I was between track 8 and 9 and watched the cars come by me and they were moving very slowly down the slight down grade of the lead. They had come off of old main where the engine was. There was no kick but rather we just got the pin and the cars drifted slowly onto the lead and into track 13 where they were intended to go. The cars were not going any faster than three miles per hour and no one was riding them. Actualing it did not look as though these cars were going fast enough to get into the clear on track 13 of the lead. Track 13 is considered a train track and cars are expected to go down this track at any time except when the blue light or blue flag is up or lighted. We use [779] this track for all kinds of switching operations. Not seeing any blue light at time we cut these cars loose, I assumed that no one was working on track 13 at the ice dock. As far as I know the cars we let drift down into track 13 were not defective in any way. The weather was clear and it was getting dusk and visibility was good. I have read the above statement and it is true.

/s/ B. Q. Craig."

Mr. Cashatt: That is all.

The Court: Any other questions of this witness?

Mr. Etter: No questions.

(Testimony of Boyd Q. Craig.)

The Court: I will excuse the jury for a 10 minute recess.

(Witness excused.)

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: I think in the interest of trying to conclude this case, as I am desperately trying to do, that I will have to modify my ruling so far as these statements are concerned, particularly does that apply to what I assume are self-serving statements taken by the defendant of its own witnesses. [780]

Now I think opposing counsel has a perfect right to call attention to discrepancies between the statement and the testimony of the witness. That doesn't mean, I think, that the whole long statement can then be put in and read; it is only material if counsel leaves out something that explains the discrepancy or straightens it out or explains it, then that part of the statement might be used. But, obviously, if Mr. Etter calls attention to one line of a 100 page deposition that you have taken on discovery, that doesn't permit you to stand up and read the rest of the deposition to the jury for two hours. We have got to cut down that practice or we never will get through here.

Mr. Cashatt: I agree with your Honor on that. The only thing, he had called attention to some parts and I did want to clear it up.

Mr. Etter: Two lines.

Mr. Cashatt: I will abide by the ruling.

The Court: I think the rule should be that if he

calls attention to some part of the statement and then there is some other part that explains or has some bearing on it, you may read that, but not read the whole statement or we will be reading statements for well into August.

Court will recess for 10 minutes.

(Whereupon, a short recess was taken, after which the following proceedings were had in the presence of the [781] jury:)

The Court: All right, proceed.

Mr. Cashatt: I might say this, your Honor, we have Mr. Morton, the other member of the crew that has been mentioned here several times in the evidence, and I will say that it wouldn't add anything to what is in evidence at this time and I won't bother to call him unless the other side would like to have him.

The Court: Well, he is here available?

Mr. Cashatt: He is right in the courtroom available.

The Court: All right.

Mr. Cashatt: Call Mr. Swanson, please.

RALPH W. SWANSON

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name is Ralph W. Swanson? A. That's right.

Q. And are you employed by the Northern Pacific Railroad? A. Yes.

(Testimony of Ralph W. Swanson.)

Q. How long have you been in their employ?

A. Since 1918. [782]

Q. And what is your present job for the Northern Pacific?

A. Over, short and damage clerk, freight claims.

Q. Freight claims? A. Yes.

Q. You live here in Spokane, Mr. Swanson?

A. Route 2, Colbert.

Q. And how long have you lived here in Spokane? A. Since 1909.

Q. Now on July 17, 1952, were you employed by the Northern Pacific at Yardley? A. Yes.

Q. And what was the nature of your job at that time? A. Assistant chief clerk.

Q. And what is the assistant chief clerk?

A. Supervising clerical duties and clerks, their particular duties.

Q. And are the records of the different ones, are those under your supervision, your over-all supervision? Were they at that time? A. Yes.

Q. And as far as the salt and ice journal, Exhibit No. 39 for identification, were you familiar with that record as of July 17, 1952?

A. Well, I am familiar with the record, yes.

Q. Is that a regular record that is kept in the course of [783] business at Yardley?

A. Yes, for the purpose, not of any Interstate Commerce Commission report, but the purpose of how much salt and ice we use, and so on.

Q. And that record has been kept at Yardley ever since? A. Yes.

(Testimony of Ralph W. Swanson.)

Q. And I believe you brought it here this morning to the courtroom? A. Yes.

Q. And the record is a regular daily or running record?

A. It is a running record of the ice foreman.

Mr. Cashatt: Again offer Exhibit No. 39, your Honor.

Mr. Etter: No objection.

The Court: It will be admitted, then. What is that number, Mr. Cashatt?

Mr. Cashatt: No. 39, your Honor.

Mr. Etter: You are just going to put in the few pages, Mr. Cashatt?

The Court: The ones that were marked before?

Mr. Cashatt: That is correct.

(Whereupon, the said records were admitted in evidence as Defendant's Exhibit No. 39.)

Q. (By Mr. Cashatt): Mr. Swanson, referring to the pages that are marked Exhibit 39 here, that is for the year of 1952, is that correct, for salt?

A. Just a moment. Yes, salt ordered for 1952.

Q. And looking at the date, it starts in January, does it? A. Yes, January 1st.

Q. Runs on, February, March, on through?

A. Yes.

Q. Now in July, is there any date in July that a car of salt was received at the Yardley yards?

A. Yes, this is the date that it was ordered for, July 15th; this is the arrival date (indicating).

Q. And referring to the date shown after the order date of July 15th, will you give the car num-

(Testimony of Ralph W. Swanson.)

ber and the date received, and so on, as shown from the exhibit?

Mr. MacGillivray: Just a minute, your Honor, I think the exhibit speaks for itself. As I understand the witness, he doesn't know any more about it except he is——

Mr. Cashatt: Maybe I can shorten this by reading it.

The Court: Yes, it is in evidence, I think you can call attention to it. It will be all right for you to do so.

Mr. Cashatt: That is fine.

Opposite the date of July 15th, the order date for car of salt, the record shows Great Northern 20206 [785] received, in one column, 7-16; unloaded 7-16. And below that, the next salt car is shown P & E 3235, received 7-18; unloaded 7-18.

Q. Now during your work with Northern Pacific, have you ever had anything to do with the icing end of the business?

A. Yes, I was ice foreman out there for a number of years.

Q. And would your testimony, Mr. Swanson, be substantially the same as Mr. Williams' concerning the duties of the ice foreman? A. Yes.

Q. And in addition to that, were you ever an ice helper? A. No.

Q. I see. Now in your experience as an ice foreman, did you at any time give any direct instructions or have any direct supervision over any of the Addison Miller employees? A. No.

(Testimony of Ralph W. Swanson.)

Q. What work did you do when you were on the ice dock?

A. To see that the amount of ice and salt was placed into the bunkers of refrigerators or cars as called for, and to fill them up as needed, as the cars needed.

Q. While you were around the ice dock, the Addison Miller dock, did you at any time ever see Addison Miller employees dumping slush ice? [786]

A. No.

Q. Did you at any time, Mr. Swanson, ever see Addison Miller employees carrying buckets of slush ice or otherwise under the couplings of stationary cars standing on Track 13?

A. No.

Q. Mr. Swanson, were you familiar with the lights on the dock in July, 1952?

A. Yes, I believe I am.

Q. And were you at that time?

A. And was at that time.

Q. And what did it indicate to you if at any time, say, at night you saw these lights burning on the Addison Miller dock?

A. It meant nothing to me.

Q. The white lights? A. The white lights.

Q. And what did it mean to you if you saw the blue lights at the west end of the Addison Miller dock or at the east end of the Addison Miller dock on?

A. Well, it meant that someone was on or about cars.

(Testimony of Ralph W. Swanson.)

Q. And when did you leave your work at the Yardley office?

A. I believe December 1, 1952.

Q. How long did you say you were ice foreman?

A. Well, I couldn't be sure, but I think I started about [787] 1940 as ice foreman.

Q. And possibly worked until about when?

A. To December, 1951.

Q. And during that period of time, were you familiar with the communication system between the yard office and the Addison Miller dock?

A. Yes.

Mr. Cashatt: That is all.

Cross-Examination

Q. (By Mr. MacGillivray): Mr. Swanson, there are two communicating systems between the yard office and the dock, aren't there, or is there not?

A. Not between the yard office and dock, no.

Q. Well, isn't there a telephone communicating system and a loudspeaker communicating system?

A. Not on the dock there isn't any loudspeaker.

Q. Well, there is a loudspeaker running from the yard office that can be used to the Addison Miller dock, isn't there?

A. Not that I know of, not on the dock.

Q. Well, is there not a loudspeaker just west of the Addison Miller dock?

A. Yes, west of the Addison Miller dock. [788]

Q. And is that not operated from the yard office?
A. Yes.

(Testimony of Ralph W. Swanson.)

Q. And that can be and has been used as a communicating system between the yard office and the dock?

A. I have never used it. I have called from the loudspeaker to the yard office, but I have never used the loudspeaker from the yard office to the dock.

Q. Well, it can be used either way, can't it?

A. Well, to the west end of the dock, yes.

Q. In other words, if you want to advise someone down at the icing dock of the imminent approach of cars at night or in the daytime, you can open your loudspeaker in the yard office and say, "Look out, boys, here comes some floating cars on Track 13" through the loudspeaker system, can't you?

A. Well, you couldn't possibly—

Q. Can't that be done, Mr. Swanson?

A. Yes, it could be done, but you couldn't possibly hear what they were saying. It would probably be a little blurred.

Q. You couldn't hear what?

A. You couldn't understand what they were saying if you were on the dock.

Q. Well, Mr. Swanson, can't you hear that loudspeaker system all over the Yardley yards when it is used? [789]

A. Well, not all over.

Q. Well, how many loudspeakers do they have in the Yardley yards, the one west of the dock and what others?

A. I think there is one at the east end of the yard.

Q. Yes?

(Testimony of Ralph W. Swanson.)

A. One at the west end of the yard.

Q. Yes, and this one west of the ice dock. And the yard is how long from west end to east end?

A. Oh, the longest track, 150 some cars, I believe.

Q. Well, what is the distance from the west end of the Yardley yard to the east end?

A. Roughly, a mile and a half.

Q. And what is the width from the north end to the south end? A. I couldn't say.

Q. Approximately?

A. Oh, let me see. Are you referring just to the trainyard or the whole yard?

Q. What is referred to as the Parkwater yard.

A. Well, the Parkwater yard from Trent Avenue to the south end of the yard, I would say about six, eight blocks.

Q. And that loudspeaker system with one outlet at the east end, one in the center by the icing dock, and one at the west end, is the loudspeaker communicating system for that whole mile and a half yard, isn't it? [790]

A. They use one at a time, they aren't connected together at the same time.

Q. Well, do I understand you correctly that you couldn't hear the loudspeaker system immediately west of the icing dock if you are on the icing dock?

A. If the wind conditions were right and everything was right, you might be able to.

Q. If it is a nice, clear summer night?

(Testimony of Ralph W. Swanson.)

A. If no chains, nothing was running, you could possibly.

Q. I see. Were you in the yard office the night of July 17, 1952? A. Yes.

Q. Do you know whether or not that loud-speaker system was used around 8:15 or 8:20 p.m.?

A. I couldn't say.

Q. Pardon?

A. I couldn't say for sure now.

Q. When were you ice foreman, from 1940 to——? A. I would say 1940 to 1946.

Q. 1940 to '46?

A. Then I was on a traveling refrigerator inspector position during '46 and '47; then back to the ice foreman's job until around 1951.

Q. And you had supervision over the icing operations insofar as icing of Northern Pacific cars at Parkwater was [791] concerned when you were icing foreman? A. Yes.

Q. Did you get down to the dock quite often?

A. Oh, yes.

Q. And the dock is about how long?

A. Oh, 27, 8 cars.

Q. About how many feet?

A. 40 feet to a car, we might say roughly.

Q. What is it, about three or four city blocks, something like that? A. Oh, yes.

Q. And the white lights on top of that dock on the north side and south side, do you know how many there are?

A. No, I couldn't say.

(Testimony of Ralph W. Swanson.)

Q. Do you know that over that four block length they are interspaced at about 48 foot intervals on each side? A. That could be.

Q. Well, isn't that about it?

A. That is close, I would say.

Q. And during your career as icing foreman, you were familiar with the type of crew that they had down there working for Addison Miller, particularly during the summer months?

A. Yes.

Q. A lot of high school kids work? [792]

A. Well, not too many that I had seen during my time.

Q. Well, quite a few? A. A few.

Q. And, ordinarily, it is a transient, not a permanent crew, is it not? A. Transient, yes.

Q. Some of them will work a couple of days, is that right, and two days later have practically an entirely different crew? A. Yes.

Q. And that has been the situation clear up to 1952 and through 1952?

A. Well, at times during the war years, we had, I believe, extra gangs they called in there permanent, permanent crews.

Q. Say from 1948 to 1952, that was the situation? A. Yes, more or less.

Q. And everyone connected with the yardmaster's office knew that situation?

A. Well, I don't know that everyone knew it, no.

Q. Well, everyone of any authority in the yardmaster's office?

(Testimony of Ralph W. Swanson.)

A. Not necessarily, some wouldn't have contact with the icing propositions at all.

Q. And the heavy season there at the icing dock when they [793] worked around the clock is during July and August?

A. Well, the heaviest season, I would say, would be August and September.

Q. Well, don't they work around the clock in July?

A. Not as much as August and September. They work around the clock all year around, 12 months a year.

Q. I see. Who pays the electricity bill down on the icing dock?

A. I don't know, I couldn't say.

Q. Don't you know that the Northern Pacific does?

A. No, I couldn't say that, I wouldn't know.

Q. Well, it is a fact, is it not?

Mr. McKevitt: I want to object to the form of that question as being a statement of fact by counsel—"Don't you know that the Northern Pacific does."

The Court: Well, the jury will understand that counsel's question is not evidence, or his statement is not evidence.

Mr. MacGillivray: Well, I understand.

Mr. Cashatt: If counsel is going to cross examine on the contract, I would like to mark it and have it admitted at this time.

Mr. MacGillivray: I have been waiting for that

(Testimony of Ralph W. Swanson.)

to happen. There is just one question in the contract that is not material, but the balance of it we have been hoping would [794] get in.

The Clerk: Are you having it marked a defendant's exhibit?

Mr. Cashatt: Yes, the defendant's exhibit.

The Court: Yes, I understand the defendant is offering it. What is the number?

The Clerk: It will be No. 42, your Honor.

Mr. MacGillivray: We can stipulate with it with one exception in the contract, one sentence that is not material, that we might point out to your Honor.

Mr. McKevitt: The contract is referred to in its entirety in the pleadings.

Mr. Etter: No, there is a part that we want——

The Court: I will ask the jury to step out a minute and take a little recess while we thresh this out.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: There is one thing that I wondered about this contract, doesn't it show that there is an agreement for Addison Miller to hold the N. P. harmless? I don't know whether that is analagous to insurance, but I would be a little afraid of it, especially if there is any objection to it, bringing that out, that sort of situation. It seems to me it would be fairer to all concerned to not bring it out. I don't know, I haven't thought out how who it might favor, really.

(Testimony of Ralph W. Swanson.)

Mr. Cashatt: This is the main body of the contract, if you would like to look at that.

The Court: Is that what you had in mind?

Mr. MacGillivray: Well, I had in mind the first sentence of that same provision. It is Provision XII, and we object to that portion of Provision XII ending in the words "State of Washington." It is a matter that was taken up on motion some time ago.

The Court: I think this is what you have in mind, that it provides for workmen compensation, and the contractor, I presume, is Addison Miller—

Mr. Etter: That's right.

The Court: —agrees to save the railroad company harmless. Would counsel be willing to stipulate to eliminate Paragraph XII from the contract?

Mr. Etter: We will stipulate that it can be eliminated.

Mr. MacGillivray: We have no objection to the "hold harmless."

The Court: I am not trying to tell you what to do.

Mr. Etter: No, we have no objection to the "hold harmless." They can leave that in if they want.

The Court: I think if we eliminate the workmen [796] compensation, we should eliminate the "hold harmless." As I say, I don't know whether—

Mr. Etter: Your Honor, you struck that on mo-

(Testimony of Ralph W. Swanson.)

tion. That was a defense, that compensation, and it was struck on motion.

Mr. McKevitt: You are willing to have "hold harmless" stay and you are willing to stipulate workmen's compensation go out?

Mr. Etter: Yes, we are willing to stipulate, or the whole thing go out.

Mr. McKevitt: You pleaded the contract; why call upon us to decide what to do with it?

Mr. MacGillivray: Well, if you are offering the contract, we are objecting to the words in Article XII ending with the words "State of Washington."

The Court: I think to make a complete record, at least so much of this contract that shows the relationship and the agreements and the method of operation of the railroad company and Addison Miller should be in this record. As I understand it, it shows an independent contractor——

Mr. McKevitt: Yes.

The Court: ——relationship, and to that extent it certainly would be favorable to the defendant, I should think. There has been some evidence slanted toward the proposition that you were controlling the employees of [797] Addison Miller and there may be an agency relationship.

Mr. McKevitt: As I recall it, your Honor, the discussion arose when I took a little slight umbrage to the fact he says, "You know that the N. P. pays the electric bill." I don't know, maybe they do and the contract provides for it. Now that was the only way that the contract was dragged into this case

(Testimony of Ralph W. Swanson.)

thus far. I don't know whether it provides whether we pay the electric bill or not.

Mr. MacGillivray: You mean you haven't read your own contract?

Mr. McKevitt: A lot of N. P. contracts I haven't read.

The Court: Is there anything else in here that is objectionable?

Mr. MacGillivray: I don't think so.

The Court: I suppose there is a good deal of it that wouldn't be very material, but would there be any objection to admission of the contract in evidence with the exception of Paragraph XII? This is a copy, we can delete it, I suppose. If there is no other way, the Clerk can cut it out and set the page up.

The Clerk: I can cut it right out of there.

The Court: Yes, just cut it out and put a backing on it of some kind before it goes to the jury.

The Clerk: That's right. [798]

Mr. McKevitt: I would leave the stipulation on that to Mr. Cashatt.

Mr. Cashatt: I believe I am the fall man.

The Court: I think if that goes in, why Mr. McKevitt may as well put on his hat and go home, because they will wonder what he is doing around here.

Mr. Cashatt: I will stipulate, your Honor, that the contract may be admitted, eliminating Paragraph XII.

The Court: Yes. Let me put it this way: I don't

(Testimony of Ralph W. Swanson.)

want counsel to go on record as agreeing to this contract or subscribing or anything of that sort. I will admit that contract in evidence with the exception of Paragraph XII. I will take the responsibility for eliminating it without any stipulation.

The Clerk: Your Honor, would this be a good time to find out when counsel are going to make copies of the pages out of the book?

The Court: Oh, yes. What is the number of this? 42?

The Clerk: That is 42, your Honor, yes.

Mr. Cashatt: I would say, Mr. Taylor, that we can take this out right now.

The Court: Take that out and then submit a copy, if you want to, and put the page back in.

Mr. Cashatt: And the same on No. 6, Mr. Taylor, and [799] No. 38 is all right as is.

The Clerk: Yes.

Mr. Cashatt: It was those two.

The Clerk: Your Honor, these two pages out of the books, then, I will just cut out. Then can I just mark out the back of it with a pen or something?

The Court: Yes. Let's see, is there anything there? Nothing that would mean much to them, I suppose. I have no objection to just lining it out.

Mr. Cashatt: Just line it out.

The Court: Just cross it out.

I thought I would quit at a quarter to six this evening, not to delay our dinners too much. I just wondered if it would be possible to finish in a two

(Testimony of Ralph W. Swanson.)

and a half hour session tomorrow morning with your testimony?

Mr. Cashatt: Oh, yes.

Mr. McKevitt: As far as we are concerned.

Mr. Cashatt: Yes, your Honor.

The Court: If there isn't too much cross examination and too much rebuttal, I presume.

Mr. Etter: I think the cross examination will be just as brief and to the point as it has been, your Honor.

Mr. McKevitt: God help us.

The Court: What I had in mind here is I have a naturalization hearing at 1:30, quite a large number of [800] applicants, that I think won't take more than an hour. If you could finish the testimony tomorrow morning, then we could argue beginning about 2:30, from then on would give us time enough.

Mr. McKevitt: We got one, two, three. Do you intend to work until a quarter until six tonight?

The Court: Yes, tonight.

Mr. Cashatt: Yes, I am satisfied we can do it, your Honor.

The Court: Do you think we should convene at 9 in the morning or 9:30?

Mr. Etter: 9:15.

Mr. Cashatt: I would think 9:30 would be all right, be done by noon.

The Court: Yes, all right, I will do that.

Mr. Cashatt: The reason I say that, we would

(Testimony of Ralph W. Swanson.)

like just a little more time on a couple of instructions. I have got some more.

The Court: Yes, all right, I will make it 9:30, then.

Call in the jury, then.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: Defendant's Exhibit 42 will be admitted, [801] with the exception of Roman numeral Paragraph XII, which the Court has directed to delete.

You may proceed, then.

(Whereupon, the said contract was admitted in evidence as Defendant's Exhibit No. 42.)

DEFENDANT'S EXHIBIT No. 42

Supplemental Agreement made this 8th day of January, 1945, between the Northern Pacific Railway Company, hereinafter called the "Railway Company", and Addison Miller Company, hereinafter called the "Contractor".

The Railway Company entered into an agreement with Addison Miller Incorporated, dated July 18, 1936, providing for the maintenance and operation of an ice plant at Yardley, Washington. Said agreement with the consent of the Railway Company, by instrument dated April 20, 1937, was assigned to the Addison Miller Company. Said agreement was altered and amended by supplemental agreements dated January 24, 1938, and October 30, 1942, and

Defendant's Exhibit No. 42—(Continued)

the parties desire to further alter and amend said agreement.

Now, Therefore, in consideration of the premises it is agreed by and between the parties hereto, that said agreement of July 18, 1936, as altered and amended by said supplemental agreements of January 24, 1938, and October 30, 1942, shall be and the same is hereby altered and amended in the following respects:

(1) By terminating said supplemental agreements of January 24, 1938, and October 30, 1942, effective as of the date and year first above written.

(2) By striking Paragraph II from said contract and substituting in lieu thereof the following:

“The Contractor shall, when directed by the Railway Company place ice in bunkers or bodies of cars set at the car icing platforms shown on Exhibit “A”.

(3) By striking Paragraph IV from said contract and substituting in lieu thereof the following:

“The Railway Company shall furnish salt in cars without charge to the Contractor at the latter's plant and the Contractor will unload and store same and when directed will place salt in the bunkers of refrigerator cars.”

(4) By striking Paragraph V from said contract and substituting in lieu thereof the following:

“The Railway Company agrees to pay the Contractor in each calendar year for all services hereinbefore enumerated and for electric power used in

Defendant's Exhibit No. 42—(Continued)

the operation of the plant including ice storage rooms, at the following rates:

(a) Three dollars (\$3.00) per ton for the first 5000 tons of ice placed in bunkers or bodies of cars and Ninety-five cents (95c) for each ton of ice so placed in excess of 5000 tons.

(b) Twenty-five cents (25c) per one hundred (100) pounds of salt placed in bunkers of cars.

(c) The actual amount paid by the Contractor for electric power and current used in the operation of said ice plant including ice storage rooms.

(d) One and 50/100 Dollars (\$1.50) per ton for all ice left in storage on termination of the agreement.”

(5) By striking Paragraph VIII from said contract and substituting in lieu thereof the following:

“It is understood and agreed that the payments provided for in item (a), Paragraph V hereof, are based on the present rates paid for labor by the Contractor and that such rates may fluctuate with changes in the rate paid common labor by the Railway Company in the vicinity of Yardley, Washington. The present rate paid common labor by the Railway Company is 56c per hour. Should the 56c per hour paid common labor by the Railway Company be increased 10% or more, with the result that the Contractor is required to increase in the same proportion rates paid for labor, or should the present rate of 56c per hour paid common labor by the Railway Company be reduced 10% or more thereby enabling the Contractor to reduce in the same pro-

Defendant's Exhibit No. 42—(Continued)

portion rates paid labor, the parties shall agree upon such change in the amount to be paid under item (a) of Paragraph V hereof, as shall fairly and justly correspond with such change in rates paid for labor by the Contractor.”

(6) By striking Paragraph XV from said contract and substituting in lieu thereof the following:

“This agreement shall become effective on March 1, 1942, and shall continue in force for a period of one year, and from year to year, thereafter, unless terminated by either party by written notice served on the other on or before November 15, 1943, or on or before November 15th of any succeeding year, of its intention to terminate the agreement as of December 31 of that calendar year.

On the termination of the agreement said ice plant shall be turned over to the Railway Company in good current operating condition.”

(7) By adding a Paragraph designated XVIII to said contract reading as follows:

“The Contractor shall prosecute the work under this contract according to its own manner and according to its own methods and with and by its own means and employees, free from any supervision, inspection or control whatever by the Railway Company, except only such inspection as may be necessary to enable the Railway Company to determine whether the work performed complies with the requirements of this contract, it being the intention of the parties hereto that the Contractor shall be and remain an independent contractor and that

Defendant's Exhibit No. 42—(Continued)
nothing herein contained shall be construed as inconsistent with that status.”

Said agreement of July 18, 1936, as hereby altered and amended shall continue in full force and effect between the parties.

In Witness Whereof the parties hereto have caused this supplemental agreement to be executed the day and year first above written.

Northern Pacific Railway Company
H. E. Stevens, Vice President
Addison Miller Company
A. T. Miller

Supplemental agreement made this 30th day of October, 1942, between the Northern Pacific Railway Company, hereinafter called the “Railway Company”, and Addison Miller Company, hereinafter called the “Contractor”.

The Railway Company entered into an agreement with Addison Miller Incorporated, dated July 18, 1936, providing for the maintenance and operation of an ice plant at Yardley, Washington. Said agreement with the consent of the Railway Company, by instrument dated April 20, 1937, was assigned to the Addison Miller Company. Said agreement was altered and amended by supplemental agreement dated January 24, 1938, and the parties desire to further alter and amend said agreement.

Now Therefore, in consideration of the premises it is agreed by and between the parties hereto that said agreement of July 18, 1936, as altered and

Defendant's Exhibit No. 42—(Continued)

amended by supplemental agreement of January 24, 1938, shall be and the same is hereby altered and amended in the following respects:

1. By terminating said supplemental agreement of January 24, 1938, effective as of February 28, 1942.

2. By striking paragraph V from said agreement of July 18, 1936, and substituting in lieu thereof the following:

“V”

“The Railway Company agrees to pay the Contractor in each calendar year for all services hereinbefore enumerated and for electric power used in the operation of the plant including ice storage rooms, at the following rates:

(a) Three Dollars (\$3.00) per ton for the first 5000 tons of ice placed in bunkers or bodies of cars and Ninety-five cents (95c) for each ton of ice so placed in excess of 50,000 tons.

(b) Twenty-five cents (25c) per one hundred (100) pounds of salt placed in bunkers of cars.

(c) The actual amount paid by the Contractor for electric power and current used in the operation of said ice plant including ice storage rooms.

(d) One and 50/100 Dollars (\$1.50) per ton for all ice left in storage on termination of the agreement.”

3. By striking paragraph VIII from said agreement of July 18, 1936, and substituting in lieu thereof the following:

“VIII”

“It is understood and agreed that the payments

Defendant's Exhibit No. 42—(Continued)
provided for in item (a), Paragraph V hereof, are based on the present rates paid for labor by the Contractor and that such rates may fluctuate with changes in the rate paid common labor by the Railway Company in the vicinity of Yardley, Washington. The present rate paid common labor by the Railway Company is 56c per hour. Should the 56c per hour paid common labor by the Railway Company be increased 10% or more, with the result that the Contractor is required to increase in the same proportion rates paid for labor, or should the present rate of 56c per hour paid common labor by the Railway Company be reduced 10% or more thereby enabling the Contractor to reduce in the same proportion rates paid labor, the parties shall agree upon such change in the amount to be paid under item (a) of Paragraph V hereof, as shall fairly and justly correspond with such change in rates paid for labor by the Contractor."

4. By striking Paragraph XV from said agreement of July 18, 1936, and substituting in lieu thereof the following:

"XV"

"This agreement shall become effective on March 1, 1942, and shall continue in force for a period of one year, and from year to year, thereafter, unless terminated by either party by written notice served on the other on or before November 15, 1943, or on or before November 15th of any succeeding year, of its intention to terminate the agreement as of December 31 of that calendar year.

Defendant's Exhibit No. 42—(Continued)

On the termination of the agreement said ice plant shall be turned over to the Railway Company in good current operating condition."

Said agreement of July 18, 1936, as hereby altered and amended shall continue in full force and effect between the parties.

In Witness Whereof, the parties hereto have caused this agreement to be executed upon the day and year first hereinabove written.

Northern Pacific Railway Company

By H. E. Stevens, Vice President

In Presence of: E. L. Ledding, J. L. Larson.

Addison Miller Company

By Addison Miller,

In Presence of: M. J. Schiffer, T. H. Collins.

Supplemental Agreement made this 24th day of January, 1938, between the Northern Pacific Railway Company, hereinafter called the "Railway Company", and Addison Miller Company, hereinafter called the "Contractor."

The Railway Company entered into an agreement with Addison Miller Incorporated, dated July 18, 1936, providing for the maintenance and operation of an ice plant at Yardley, Washington. Said agreement, with the consent of the Railway Company, by instrument dated April 20, 1937, was assigned to Addison Miller Company, and the parties hereto now desire to alter and amend said agreement.

Now Therefore, in consideration of the premises

Defendant's Exhibit No. 42—(Continued)

it is agreed by and between the parties hereto that said agreement of July 18th, 1936, shall be and the same is hereby altered and amended in the following respects:

A. By striking Paragraph V, and substituting in lieu thereof the following:

“The Railway Company agrees to pay the Contractor in each calendar year for all services hereinbefore enumerated and for electric power used in the operation of the plant including ice storage rooms, at the following rates:

(a) Two and 75/100 Dollars (\$2.75) per ton for the first 5000 tons of ice placed in bunkers or bodies of cars and Seventy cents (70c) per ton for each ton of ice so placed in excess of 5000 tons.

(b) Twenty-five cents (25c) per one hundred (100) pounds of salt placed in bunkers of cars.

(c) The actual amount paid by the Contractor for electric power and current used in the operation of said ice plant including ice storage rooms.

(d) One and 50/100 Dollars (\$1.50) per ton for all ice left in storage on termination of the agreement.”

B. By striking Paragraph VIII, and substituting in lieu thereof the following:

“It is understood and agreed that the payments provided for in item (a), Paragraph V hereof, are based on the present rates paid for labor by the Contractor and that such rates may fluctuate with changes in the rate paid common labor by the Railway Company in the vicinity of Yardley, Washing-

Defendant's Exhibit No. 42—(Continued)

ton. The present rate paid common labor by the Railway Company is 44c per hour. Should the rate of 44c per hour paid common labor by the Railway Company be increased 10% or more, with the result that the Contractor is required to increase in the same proportion rates paid for labor or should the present rate of 44c per hour paid common labor by the Railway Company be reduced 10% or more thereby enabling the Contractor to reduce in the same proportion rates paid labor, the parties shall agree upon such change in the amount to be paid under item (a) of Paragraph V hereof as shall fairly and just correspond with such change in rates paid for labor by the Contractor."

C. By striking Paragraph XV, and substituting in lieu thereof the following:

"This agreement shall become effective on January 1, 1938, and shall continue in force for a period of one year, and from year to year thereafter, unless terminated by either party by written notice served on the other on or before November 15, 1938, or on or before November 15th, of any succeeding year, of its intention to terminate the agreement as of December 31 of that calendar year.

On the termination of this agreement said ice plant shall be turned over to the Railway Company in good current operating condition."

Said agreement of July 18, 1936, as altered and amended by this supplemental agreement, shall continue in full force and effect between the parties.

In Witness Whereof, the parties hereto have

Defendant's Exhibit No. 42—(Continued)
caused this agreement to be executed upon the day
and year first hereinabove written.

Northern Pacific Railway Company

By H. E. Stevens, Vice President

In Presence of: E. L. Ledding, R. D. VanVoorhis.

Addison Miller Company

By Addison Miller

In Presence of: Mary Dempsey, Myrtle M. Swanson.

For value received we hereby assign and transfer to Addison Miller Company that certain contract between the Northern Pacific Railway Company and the undersigned, dated July 18, 1936, as amended and supplemented, covering the operation of ice plant located at Yardley, Washington, together with all our rights and interests therein, this assignment and transfer to take effect as of May 1, 1937.

In Witness Whereof the said Addison Miller, Incorporated has caused these presents to be executed this 20th day of April, 1937.

[Seal] Addison Miller, Incorporated

By Addison Miller, President

In consideration of the consent of the Northern Pacific Railway Company to the foregoing assignment, Addison Miller Company, a partnership, hereby assumes each and all of the obligations of said contract of July 18, 1936, from and after the

Defendant's Exhibit No. 42—(Continued)
first day of May, 1937, with any endorsements or supplementary agreements relating thereto prior to the date hereof, and covenants and agrees to observe and perform and be bound by each and all of the terms, covenants and conditions of said agreement from and after the first day of May, 1937, in all respects as if it had been therein named as the Contractor.

In Witness Whereof I have hereunto set my hand and seal as of the 20th day of April, 1937.

Addison Miller Company

By Addison Miller, Co-Partner

Signed in the presence of: L. J. Schiffer.

In consideration of the foregoing agreement by Addison Miller Company, the Northern Pacific Railway Company hereby consents to the above assignment, with the understanding tha' Addison Miller, Incorporated is not relieved from the obligations of said contract of July 18, 1936, as amended and supplemented, with respect to matters arising out of the performance of said contract prior to the first day of May, 1937.

Northern Pacific Railway Company

By H. E. Stevens, Vice President

Agreement made this 18th day of July, 1936, between Northern Pacific Railway Company, hereinafter called Railway Company, and Addison Miller, Incorporated, hereinafter called Contractor.

The Railway Company has evidenced its intention

Defendant's Exhibit No. 42—(Continued)

to purchase from the Contractor, effective as of January 1, 1937, the Contractor's interest in certain land, together with the building thereon and car icing platform, ice manufacturing machinery and appurtenant facilities, hereinafter referred to as "ice plant", located at Yardley, Washington, as indicated in red on the blue print marked Exhibit "A", hereto attached and made a part hereof.

The Railway Company desires the Contractor to maintain and operate said ice plant for the purposes hereinafter provided.

Now Therefore, in consideration of the promises and mutual dependent covenants and agreements hereinafter contained, the parties agree as follows:

I.

The Contractor shall operate, at its sole cost and expense, said ice plant, and shall manufacture and store ice in such quantities as the Railway Company shall from time to time direct. The Contractor shall not be required to manufacture and deliver more than fifteen thousand (15,000) tons of ice in any one year, and shall have in storage on August 1st of each year not less than twenty-seven hundred (2700) tons of ice, unless notified by the Railway Company, in writing on or before the 1st day of June, that a lesser amount will be required.

II.

The Contractor shall, as and when directed by the Railway Company, place ice in bunkers or

Defendant's Exhibit No. 42—(Continued)

bodies of cars set at the car icing platforms shown on Exhibit "A". The icing of cars shall be performed in such manner and in accordance with such rules and regulations as may be issued from time to time by the Railway Company.

III.

The Contractor, at its own sole cost and expense, shall maintain said ice plant and make such reasonable replacements and renewals as may become necessary for the continued efficient operation of the plant.

IV.

The Railway Company shall furnish salt in cars and the Contractor shall unload, store and place same in bunkers of cars as and when directed by the Railway Company.

V.

The Railway Company agrees to pay the Contractor in each calendar year for all services hereinbefore enumerated, upon the basis of ice furnished and salt handled per annum, at the following rates:

(a) Two and 50/100 Dollars (\$2.50) per ton for all ice placed in bunkers or bodies of cars.

(b) Twenty-five cents (25c) per one hundred pounds for all salt placed in bunkers of refrigerator cars, said amount to cover services in unloading and storing salt.

VI.

Subject to the approval of the Railway Company, the Contractor shall be permitted to make additions

Defendant's Exhibit No. 42—(Continued)
and betterments in said ice plant in the interest of providing more efficient and economical operation, and the cost of such additions and betterments, when so approved, shall be paid for by the Railway Company upon presentation and audit of bills covering the cost thereof.

VII.

A ton of ice whenever used in this agreement shall mean a ton of two thousand (2,000) pounds, and for the purpose of determining payments hereunder, the amount of ice placed in bunkers of cars shall be determined in accordance with the provisions of Circular 128-L, and revisions thereof as may be made from time to time, issued by the General Superintendent of Transportation of the Railway Company, covering dimensions and capacities of ice bunkers of railroad and private line refrigerator cars; and for ice placed in bodies of cars, the amount of ice shall be based on average weight of cakes of ice at time of loading.

VIII.

It is understood and agreed that the payments herein specified are based on the present schedule of rates for electric current and power to be paid by the Contractor, which schedule of rates is hereto annexed, marked Exhibit "B", and made a part hereof, and upon the present rates for wages for common labor paid by the Railway Company in the vicinity of Spokane. It is understood that the present rate of wages for said common labor now

Defendant's Exhibit No. 42—(Continued)
is thirty-nine cents (39c) per hour, and that the payments specified in paragraph V hereof shall continue in effect so long as schedule of rates now being paid by the Contractor for electric current and power and the rate of thirty-nine cents (39c) per hour for said common labor remain in effect within ten per cent (10%) of said present rates. Should said schedule of rates for electric current and power be hereafter changed, or should the rate of thirty-nine cents (39c) per hour for said common labor hereafter change ten per cent (10%) or more from the rate now in effect, the parties hereto shall thereupon agree upon such change in the amount to be paid for the services rendered hereunder as will fairly and justly correspond with such change.

IX.

Monthly settlement will be made with the Contractor upon check and approval of the bills for service rendered during the preceding month.

X.

The Contractor shall furnish to the Railway Company such records and statements as it may reasonably require in respect to the services rendered hereunder, and the Railway Company may at all reasonable times inspect all the books and records of the Contractor in any way pertaining to this contract.

XI.

If the Contractor shall fail to deliver to the Rail-

Defendant's Exhibit No. 42—(Continued)

way Company the quantities of ice as hereinbefore provided, for any reason other than fires, floods, strikes, riots, or accidents to the plant and facilities, and shall continue to fail to so deliver ice for a period of ten (10) days after written demand to deliver ice shall have been made upon it by the Railway Company, then and in that event the Railway Company may, at its option, obtain ice from other sources or purchase from others at the lowest prices obtainable such quantities of ice as may be required at Yardley up to the amount of the maximum specified in Paragraph I hereof, until such time as the Contractor shall notify the Railway Company of its ability to resume delivery according to the terms of this contract, and the Contractor shall, within thirty (30) days after receiving bill therefor, pay the difference between the amount expended by the Railway Company in procuring ice and the amount which would have been paid for the same quantities of ice if furnished under this agreement. If such failure on the part of the Contractor shall be due to fires, floods, strikes, riots, or accidents to the plant and facilities, the Contractor and the Railway Company shall be released from their respective obligations under paragraphs I and II hereof.

XIII.

The Railway Company shall furnish to the Contractor free transportation over its lines for all material and equipment necessary in the operation of the said ice plant, and shall also furnish free to

Defendant's Exhibit No. 42—(Continued)

the Contractor a reasonable amount of transportation for its employees, to be used only in connection with and when engaged in the performance of this contract.

XIV.

Any question hereafter arising under or touching the construction of this contract or any part thereof, or concerning the business or the manner or mode of transacting the business to be carried on under the provisions hereof, or the observance or performance of any of the conditions hereof, upon which the parties shall not agree, shall be submitted to the arbitrament of three competent disinterested persons. The party demanding such arbitration shall give to the other party notice of such demand stating specifically the questions to be submitted for decision, and nominating a person who has the desired qualifications to act as one arbitrator. If at the expiration of thirty (30) days from the receipt of such notice the party receiving it has not notified the party demanding such arbitration of its nomination of a second arbitrator having such qualifications, the party making the demand may make such selection. The first and second arbitrators chosen shall select a third. If the arbitrators chosen shall be unable to agree upon a third arbitrator, such third arbitrator may be appointed upon ten (10) days' notice upon motion of either party to a Judge of the District Court of the United States for the District of Washington. When the board is complete, the arbitrators shall

Defendant's Exhibit No. 42—(Continued)

fix a day and place for the hearing of which the parties shall be severally notified. The decision of the majority of the arbitrators shall, when stated in writing and delivered to both parties, be binding and conclusive upon them, and each party hereby expressly agrees to be bound conclusively thereby, and to perform the conditions thereof, and to make immediately such changes in the conduct of its business or such payment or restitution as in and by such decision may be required of it. The books and papers of the parties, as far as they relate to any matters submitted to arbitration, shall be open to the examination of the arbitrators. The party against whom the award is made shall pay all the fees and expenses of the arbitration.

XV.

This agreement shall become effective on January 1, 1937, and shall continue in force for a period of one year, and from year to year thereafter, unless terminated by either party by written notice served on the other on or before November 15th, 1937, or on or before November 15th of any succeeding year, of its intention to terminate such contract effective as of December 31st of that calendar year. Upon the effective date of the termination of this contract, the Railway Company will pay at the rate of One and 50/100 Dollars (\$1.50) per ton for ice tonnage manufactured by the Contractor that may then be in storage at said plant. On the termination of the contract the plant and all ap-

Defendant's Exhibit No. 42—(Continued)
purtenant facilities shall be turned over to the Rail-
way Company in good current operating condition.

XVI.

It is agreed that the Contractor shall not assign this contract or any interest therein without the written consent of the Railway Company, nor shall a receiver or trustee in bankruptcy, or other assignee of the Contractor by operation of law, assign this agreement without such written consent.

XVII.

Except as herein otherwise provided, this agreement shall inure to the benefit of and be binding upon the successors and assigns of both the parties hereto.

In Witness Whereof, the parties hereto have executed these presents the day and year first above written.

Northern Pacific Railway Company

By H. E. Stevens, Vice President

In Presence of: J. R. Ulyatt.

Addison Miller, Incorporated

By Addison Miller, President

In Presence of: L. J. Schiffer.



Defendant's Exhibit No. 42—(Continued)

EXHIBIT B

The Washington Water Power Company
Spokane, Washington

Schedule 42

Primary Power and Light (Non-Regulated)
Alternating Current

Classification:

This rate applies to all commercial power when service is used for power and incidental light, the supply being 3-phase, 60-cycle, alternating current at 2300, 6600 or 13,200 volts (at the Company's option) from regular non-regulated power feeders. The customer furnishes and maintains any transformers and regulators required.

Rate:

First 50 K.W.H. per K.V.A. of demand per month at 3c per K.W.H.

Next 100 K.W.H. per K.V.A. of demand per month at 1.5c per K.W.H.

Next 250 K.W.H. per K.V.A. of demand per month at 1c per K.W.H.

Over 400 K.W.H. per K.V.A. of demand per month at 0.7c per K.W.H.

Subject to the following Quantity Discount based on the monthly bill:

1st: \$200.00—net \$200.00.

3rd: \$100.00—20% discount—net \$80.00.

4th: \$100.00—30% discount—net \$70.00.

All over \$400.00—40% discount.

Defendant's Exhibit No. 42—(Continued)

Determination of Demand:

The demand will be determined either by suitable indicating or recording instruments and will be expressed in kilovolt amperes.

Minimum Charge:

The minimum charge under this schedule will be \$1.50 per K.V.A. of demand and in no event less than \$50.00 per month.

Term:

The minimum term of contract will be one year.

Terms and Conditions of Service:

Any lighting must be taken from the phase or phases on which the demand measuring instruments are installed. For other terms and conditions see last sheet.

Filed: April 28, 1924.

Effective: April 29, 1924.

Applies to Spokane and Spokane Suburban.

Q. (By Mr. MacGillivray: Mr. Swanson, you made the statement that while lights on the top of the Addison Miller dock illuminated at night meant nothing down there at the Yardley yards, is that right? A. That's right.

Q. Are you speaking as of the present or as of prior to July 17, 1952?

Mr. Cashatt: I object to that, as to the present.

The Court: I'm sorry, I didn't get the question.

(The question was read.)

(Testimony of Ralph W. Swanson.)

The Court: In what respect?

(The preceding question was read.)

The Court: And then the next question, whether that was before or——

Mr. MacGillivray: Whether he is speaking of before or after that time.

The Court: Well, I think it should be confined to [802] the time of the accident and prior.

Q. (By Mr. MacGillivray): Are you speaking as prior to July 17, 1952? A. Yes.

Q. You did know from your experience as an ice foreman out there that the white lights were illuminated at any time that anyone was working on top of the salt dock or in the salt pit immediately adjacent to Track 13, or unloading salt or icing cars on doing any work on or around that dock at night connected with the icing operations, did you not? A. Yes.

Q. And from your experience at night when the white lights were on, the probable indication, at least, was that some type of work was going on at and around that dock?

A. Yes, or someone was on the dock.

Q. Pardon?

A. Or someone was on top of the dock.

Mr. MacGillivray: That is all. [803]

Redirect Examination

Q. (By Mr. Cashatt): Mr. Swanson, in any of your experience out there, was the loudspeaker that counsel has referred to, which is located west of

(Testimony of Ralph W. Swanson.)

the Addison Miller dock, ever used to warn Addison Miller employees of any switching?

Mr. MacGillivray: Are you speaking of prior to July 17, 1952?

Mr. Cashatt: That's right.

A. No, I don't believe it was ever used, not to my knowledge, in warning them of switching operations or anything like that.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. MacGillivray): Prior to July 17, 1952, was that loudspeaker system only used to warn and advise employees of the Northern Pacific?

A. I don't think that that was the purpose of the loudspeaker, as a warning.

Mr. McKevitt: You say what?

A. The loudspeaker, I don't believe, was put in for the purpose of warning anyone of approaching cars.

Q. (By Mr. MacGillivray): Well, isn't that one of the [804] purposes for which it was used prior to July 17, 1952, to advise and warn Northern Pacific employees?

A. No, I think it was for the yardmaster to relay work to his switchmen in the yards, or to have them come to the loudspeaker to talk to the yardmaster relative to movements in the yard.

Q. And you have never heard it used for any other purpose?

(Testimony of Ralph W. Swanson.)

A. No, not to my knowledge. As the present time, I can't think of when it was.

Q. Did you happen to be out there at the yards the night of June 23rd this year when some individuals were taking pictures out there in the yards?

Mr. Cashatt: I object to that, your Honor. That is going to open a field——

Mr. MacGillivray: That is subsequent to July 17th, I'm sorry.

That is all, Mr. Swanson.

The Court: Any other questions?

Mr. Cashatt: That is all.

The Court: That is all, then.

(Witness excused.)

Mr. Cashatt: Mr. Fincher. [805]

ROBERT C. FINCHER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name is Robert C. Fincher? A. Robert C. Fincher, yes.

Q. And where do you reside, sir?

A. 1613 East Mallon.

Q. And were you employed by Addison Miller during 1952? A. Yes, sir.

Q. And how long had you worked for Addison Miller prior to that time?

A. About 26 years.

(Testimony of Robert C. Fincher.)

Q. And will you please just speak up, Mr. Fincher, so everyone can hear?

A. Around 26 years.

Q. And on the night of July 17, 1952, about what time did you come back to the ice dock after lunch?

A. Around 7 or 7:15, 7:30. I don't just remember exact.

Mr. McKevitt: You are letting your voice drop and we can't hear.

A. I say around 7:15 or 7:30, I don't just remember the time.

Q. (By Mr. Cashatt): By the way, Mr. Fincher, were you [806] subpoenaed as a witness in this case? A. Yes, sir.

Q. By the defendant? A. Yes.

Q. Now, Mr. Fincher, when you came back to the dock at 7:15 or 7:30 on the evening of July 17, '52, did you put any men to work unloading salt from a box car? A. No, sir.

Q. Was there any boxcar on Track 13 containing salt to be unloaded at that time?

A. Not to my knowledge.

Mr. Etter: Just a minute, I am going to object to the form of that question. It is leading and suggestive and there are about three questions in one.

The Court: Well, I will let it stand.

Q. (By Mr. Cashatt): Now what time had you come on shift that day? A. Three o'clock.

Q. Had there been any salt car located on

(Testimony of Robert C. Fincher.)

Track 13 at any time between 3 o'clock in the afternoon and the time the Stintzi boy was injured?

A. No, sir.

Q. After coming back to the dock about 7:15 or 7:30 on that day, was there any work done concerning salt in any way? [807]

A. Yes, we were raising salt from the salt house up on to the dock and distributing it along the dock, but we wasn't unloading any salt.

Q. Now that operation that you have told us about, how many men did you have working on that operation?

A. Oh, there was between six and 7, five, somewhere along there. There was some using the trucks and some in the house below, and we have what we call a hoist and we have a gig, what we call the salt gig. The boys below puts it on the gig and we raise it up on to the dock. It is electric.

Q. Now were you working in that operation?

A. Yes, I was running the hoist.

Q. And where were you located?

A. On top of the dock.

Q. And where were the other men working on this salt operation located?

A. Well, they were partly under the dock in the salt house and some up on top distributing the salt up the dock.

Q. And you say there were some in the salt house? A. Yes, some down below.

Q. Where is the salt house in relation to where the gig that you were operating is located?

(Testimony of Robert C. Fincher.)

A. It is right under it. [808]

Q. Is the salt house all confined in the dock area itself?

A. Yes, it is right under the dock. There is two, we have two salt houses. One we call the east house and the west house.

Q. And then you say how many were down there? A. I don't just remember.

Q. Do you remember a boy by the name of Ray Idaho Davis that was down there? Was he down there?

A. Yes, I think he was working downstairs.

Q. In the salt pit? A. In the salt pit.

Q. And I believe you mentioned that you had some working with salt up on top of the dock. What were they doing?

A. We unloaded up there on hand trucks and wheel it along the dock, distribute it along the dock, so we could have it handy for the cars when they come in.

Q. And at that time, was anyone at any time between 7:15 and 7:30 and the time the Stintzi boy was injured, unloading any salt from a boxcar?

A. No, sir.

Q. Now did you instruct the Stintzi boy and two or three others to clean out the slush pit?

A. Yes, sir.

Q. And what instruction did you give them?

A. Well, I told them to clean it out, put it on the north [809] side of Track 13.

(Testimony of Robert C. Fincher.)

Q. Where were you when you gave that instruction?

A. Well, we was right by the pit where the slush comes in.

Q. Was that up on the dock or down by the slush pit? A. No, down by the pit.

Q. Down by the pit? A. Yes.

Q. Did you watch them as they started doing this work?

A. Yes, I watched them and seen them coming back through the cars and I warned them not to go through them cars. I told them they might get hurt, they might bump them cars and it would hurt them. I told them to go around.

Q. Did you see them going through cars?

A. They were just coming back with an empty bucket when I seen them.

Q. And what did you tell them?

A. I told them not to go through them cars, to go around the end of the cars.

Q. How many cars were on Track 13?

A. I think they would have to go around about two and a half. I don't think the third car was quite even with where they came out with the slush.

Q. You mean——

A. It might have been.

Q. ——to go to the east two and a half cars?

A. Two and a half car lengths, possibly three.

Q. At the time you put these boys to work carrying out this slush ice, did you put up any blue light on the west end of the dock on Track 13?

(Testimony of Robert C. Fincher.)

A. No, sir.

Q. What did you say? A. No.

Q. Was there a blue light burning on Track 13 at any time between the time you came back from lunch at about 7:15 or 7:30 and when the Stintzi boy was injured?

A. Not that I know of. See, we don't turn them lights on unless we are icing cars.

Q. Are you the one that has charge of turning on the light? A. Yes.

Q. When you are on shift?

A. When I am on shift.

Q. What is your job with Addison Miller and was it at that time? A. Foreman.

Q. I see.

Mr. Cashatt: That is all. [811]

Cross Examination

Q. (By Mr. Etter): You were up on top of the dock running the salt gig, is that it, when the Stintzi boy was hurt? A. Yes, sir.

Q. How long have you been a foreman out there, Mr. Fincher? A. Ten years.

Q. Beg your pardon? A. Ten years.

Q. Ten years. A. Yes, sir.

Q. Young Stintzi worked out there in 1950 when he was 15, didn't he?

A. I think he did, I ain't positive.

Q. Well, you remember that he worked out there, as a matter of fact, don't you?

A. He didn't say he was 15 years old.

(Testimony of Robert C. Fincher.)

Q. Well, I know, but he worked out there in 1950?

A. Yes, he worked there two different times.

Q. Well, was it 1950 when he worked there first?

A. I couldn't swear to that, no. It might have been '51.

Q. As a foreman, you have been running that ice dock how many years? A. Ten years. [812]

Q. Ten years as a foreman?

A. As a foreman.

Q. I see. And how many times every summer do you clean out the slush pit?

A. Well, I hardly ever clean it, that is generally done during the daylight hours.

Q. Beg your pardon?

A. That is done mostly during the daylight hours.

Q. Well, now, certainly you have had that slush pit cleaned up in the 10 years you have been the foreman running that dock, haven't you, Mr. Fincher? A. Well, not very many times.

Q. Well, how many times in 10 years?

A. Oh, I don't know, I wouldn't say I cleaned it over two or three times.

Q. In 10 years? A. Yes.

Q. That is your testimony. You have always been on the night shift, is that it?

A. Always been on the night shift.

Q. I see. So in about 10 years, your testimony is that your shift has cleaned it three times?

(Testimony of Robert C. Fincher.)

A. Possibly that many, maybe not that many.

Q. So when Gerry Stintzi and these boys cleaned it that night, that would be about the third time it had ever [813] been done under your direction?

A. Yes, I have an idea it was.

Q. Have you got any idea of how long it was before that that you had ever cleaned the slush out?

A. No, sir.

Q. When was the second time, if you remember?

A. Oh, I don't remember over that 10 years when it was.

Q. When you had these boys clean it that night, could you remember then the last time that you had ever done that? A. No, sir.

Q. You could not? A. No.

Q. Well, do you know that slush ice is taken out on other shifts by virtue of your acquaintance with the other foremen on other shifts?

A. Yes, it was generally taken out during the day.

Q. Well, how many times, ordinarily, does that slush pit require attention, some servicing or some emptying or whatever you might call it?

A. That is according to the season, according to how much ice is taken out. Maybe it won't be cleaned for three or four months.

Q. When is your busy season?

A. Well, from the last of July, or middle of July, to [814] about the middle of September.

Q. The middle of July to the middle of September, about two months? A. Yes.

(Testimony of Robert C. Fincher.)

Q. How many times is that cleaned out during that period of time?

A. Well, I don't know, I never cleaned it often enough to know.

Q. Well, do you know from the other foremen on the day crew?

A. It is according to how the ice is coming out and how much we are using. Sometimes it might be quite a little in there, and maybe it would go a long time there wouldn't be any.

Q. You haven't any idea, then, in your 10 years as a foreman out there running that ice dock, you haven't any idea how many times they clean that slush pit out on the daylight shift?

A. No, sir.

Q. You haven't got the least idea?

A. No, because maybe sometimes they would clean it—Now this time of year we never have to clean it, it melts itself. A little warm now, before we get busy, they don't have to clean it.

Q. Well, did it require cleaning on July 17th of 1952? [815]

A. Yes, when we get busy.

Q. What was the situation in that slush pit on July 17, 1952?

A. I don't just understand what you mean.

Q. Well, did it have a lot of slush ice in it, or did it have a little bit, or what was the situation?

A. Oh, it had not an awful lot. There was some in there.

Q. Well, how much did it have in there?

(Testimony of Robert C. Fincher.)

A. Well, that is hard to say.

Q. Well, you say not an awful lot; was it a bucket or two or three buckets or four buckets?

A. Oh, I have an idea——

Q. A gallon or half a gallon or a quart? Give us some idea.

A. Probably 10 or 12 buckets.

Q. 10 or 12 buckets?

A. Yes, maybe a little more.

Q. What size bucket?

A. Oh, gosh, I don't know.

Q. Well, what—— A. Holds about——

Q. Beg your pardon?

A. About a 5-gallon bucket.

Q. About a 5-gallon bucket?

A. Yes. [816]

Q. As a matter of fact, do you know the buckets that you use, are you acquainted with those, Mr. Fincher? A. Yes, but I don't know just——

Q. All right, is it a 5-gallon bucket?

A. Well, I don't know exactly how much it would hold, no.

Q. You have been out there 10 years, you don't know anything about how much this bucket holds?

A. No, we never measured what those buckets hold.

Q. Well, how do you measure when you put any ice in? Have you got any idea how much ice you put in these cars?

A. We don't use no buckets to put ice in the cars.

(Testimony of Robert C. Fincher.)

Q. How do you know how much ice you put in them? A. You go by the cake count.

Q. Do you know what a cake of ice weighs?

A. Yes, sir.

Q. How much does it weigh?

A. It weighs 400 pounds.

Q. How do you know it weighs 400 pounds?

A. Well, that is what it is supposed to weigh.

Q. You have been around there long enough to know, Mr. Fincher, haven't you? A. Yes.

Q. All right, this bucket holds 5 gallons?

A. I suppose about that.

Q. Yet you don't know whether there were 4, 10, or 12 [817] bucketfuls in there?

A. Yes, there might have been a little more.

Q. Well, would it be safe to say there was 60, 79, or 80 gallons of ice slush, is that correct?

A. Yes.

Q. Do you recall how far up toward the chain, that is, the conveyor chain, the ice slush had worked at the time you asked or ordered these boys to clean it out?

A. Well, it don't really work up under the chain very much, it rolls out away from the chain mostly, just come up to a little pile on the chain.

Q. I see. Where did you first see these boys, Mr. Fincher? Where were they when you ordered them to do this work?

A. Well, they went with me over from the plant, the plant where we eat lunch——

Q. Just a minute. Did you eat lunch with them?

(Testimony of Robert C. Fincher.)

A. No, but I eat at the same time.

Q. You eat at the same time?

A. Then we go over from the ice house, not right at the ice dock.

Q. All right, who came over from the ice house after you had lunch? Who were you with?

A. Oh, I had about 10 or 15 men with me. I don't just remember exactly how many.

Q. 10 or 15 men? [818] A. Yes.

Q. They were all with you as you came back through the tunnel?

A. Yes, through the tunnel.

Q. All right, when you came through the tunnel and started up the stairs, did you go up to the top of the icing dock?

A. No, I sent some of them up there and some around into the salt house.

Q. I gather, then, that you stopped——

A. Yes.

Q. ——down by the slush pit?

A. Told some of them to clean out the slush.

Q. Well, not to go too fast, you stopped by the slush pit? A. Yes.

Q. Is that right? A. Yes.

Q. All right, were all these 15 men standing around there?

A. No, sir, some of them went on up on the dock.

Q. Well, did you send them up there?

A. Yes.

(Testimony of Robert C. Fincher.)

Q. What did you tell the ones to do that were going up on the dock?

A. I told them, I said part of us would put up salt and the other part would clean the slush. [819]

Q. All right, who did you tell to clean the slush?

A. Well, I didn't pick out any particular ones, I just——

Q. What did you say?

A. I says, "Four or five of you clean this slush and the rest of us will go put up salt."

Q. Well, who was standing around when you said that?

A. Oh, I don't know who it was.

Q. Beg your pardon?

A. It is hard to remember just who all was around there at that time. That was two years ago.

Q. All right, who did clean the slush out, then?

A. Well, the Stintzi boy and a fellow by the name of Maine and one by the name of Johnson, and another one or two started, but I don't know just what their names were.

Q. Do you know Joe Vallarano?

A. I wouldn't know him if I seen him, I don't think.

Q. Do you know John Tarnasky?

A. No, sir. I might know him, but not know him by name.

Q. You don't know, then, who you told to clean the slush out?

A. No, I just told that certain bunch that was there to clean it out.

(Testimony of Robert C. Fincher.)

Q. How do you remember that you told Maine?

A. Well, because him and Stintzi generally worked together. [820]

Q. You didn't know Allan Maine, did you?

A. Well, yes, I knowed he was working.

Q. You knew he was working there, he had been there about a week?

A. I don't know just how long.

Q. And you haven't seen him since the 17th, have you? A. Not to talk to him.

Q. Well, where have you seen him otherwise?

A. I think I have seen him in here.

Q. But until this trial, have you seen Allan Maine any place? A. No, sir.

Q. But you remembered him when you saw him here? A. Yes, I think so.

Q. Beg your pardon? A. Yes.

Q. But you don't remember Joe Vallarano?

A. Yes, I kind of remember him, yes. I think I might know him if I seen him.

Q. Well, didn't he work on that slush cleaning?

A. I think he did.

Q. And John Tarnasky, do you remember a Canadian that was working there for you?

A. No, there is so many work there that it is hard to remember them. [821]

Q. A lot of high school kids?

A. Not so many, but then there is a few high schools kids and lots of other men.

Q. All right, now, did you just say to a lot of fellows that were there, "Some of you go ahead and

(Testimony of Robert C. Fincher.)

clean out this slush, and some of you do such and such?"

A. Yes, sir.

Q. Did you tell Gerry Stintzi to clean out slush?

A. I don't remember whether I mentioned his name or not.

Q. Did you tell Allan Maine to clean out any——

A. I couldn't swear that I told him.

Q. You don't remember that you told any separate individuals?

A. Not certain ones, no. I just says, "Some of us will clean out the slush and some will put up the salt."

Q. Well, now isn't it the fact, Mr. Fincher, that what you did, you said, "Young Stintzi"—you knew him and you said, "you get yourself a few men and go down and clean out the slush bucket," didn't you say that, or "the slush pit?"

A. I don't know as I did, I might have.

Q. Well, isn't it a fact when you said that, you were up on the ice dock, you weren't down in the slush pit at all?

A. No, sir, I didn't go up on the dock 'til afterwards. [822]

Q. You didn't go up on the dock?

A. Not right away.

Q. All right, then, when you said, "Go ahead and clean out the slush pit," how many men started working at it?

A. I believe there was five or six, now I couldn't swear which.

(Testimony of Robert C. Fincher.)

Q. All right, tell us what they did. Tell us the operations you saw.

A. Well, one of them got down in the pit with the shovel and filled the bucket and handed it up to the boys to carry out.

Q. All right, and did you tell the boys what they should do with the slush?

A. I told them, yes, told them where to put it.

Q. Where did you tell them to put it?

A. Across the tracks.

Q. Across the track? A. Yes.

Q. You told them to take it across the track; are you referring to Track No. 13?

A. 13, yes.

Q. And where did you tell them to dump it, over north of Track 13? A. Yes.

Q. Why did you tell them to dump it there?

A. Well, that is a kind of a cleanup and trash track and where they clean cars and everything, so we was just in the habit of throwing our stuff there.

Q. Throwing paper and everything else there, isn't that right? A. Yes.

Q. That has been used as a trash dumping place for the 10 years you have been there, isn't that so?

A. Yes, sir.

Q. And your salt sacks are dumped over there, the paper ones, aren't they?

A. The paper ones, yes.

Q. Yes. And you have dumped other refuse over there that you have in those cars, isn't that so?

(Testimony of Robert C. Fincher.)

A. No, we never clean no cars.

Q. No, but any refuse you find or that you are using in your operation, your paper sacks and your ice and stuff, you dump it over there?

A. Yes, we do.

Q. Isn't that right? A. Yes.

Q. And had been during the time you have been working there for 10 years, isn't that right?

A. Yes.

Q. Now at the time you told them to go north and dump it, [824] did you tell them anything else, Mr. Fincher?

A. I don't remember that I did.

Q. Then what happened? Who took out the first bucketful?

A. I believe Stintzi and Maine took the first buckets.

Q. Took the first buckets? A. Yes.

Q. How long did it take them to fill the bucket up?

A. Oh, just three or four scoop-shovelfuls, as quick as you could scoop it up and put it in the bucket.

Q. It was full and they started out with it, is that right? A. Yes.

Q. Did you follow them?

A. No, I had been somewhere else, I come back, and they had already emptied the bucket.

Q. Oh, they had emptied the bucket?

A. Yes.

(Testimony of Robert C. Fincher.)

Q. Where did you see them? Did you see them start out the door with the bucket?

A. No, I didn't.

Q. Well, when was the last time you saw them with the bucket?

A. They were coming back. They had emptied the bucket and were coming back and climbing through the cars, and I told them not to do that.

Q. Oh, just a minute. They were coming back, where were [825] you when they were coming back?

A. I was right at the end of where they go outside.

Q. Where they were to go outside?

A. No, where they step outside after they go up the stairs.

Q. All right. Mr. Fincher, directing your attention to Plaintiff's Exhibit No. 7, looking into an entrance, is that the entrance that you have reference to? A. Yes.

Q. Where were you standing, sir?

A. I was right in here somewhere (indicating).

Q. You were right there?

A. Yes. They were coming—as they come through the cars.

Mr. McKevitt: Louder, please.

Mr. Etter: A little louder.

Mr. McKevitt: Can't hear you.

A. As they come through the cars, I was standing there as they came through and started down there, and that is where I saw them.

(Testimony of Robert C. Fincher.)

Q. (By Mr. Etter): How long had you been standing there?

A. Oh, I don't know, I think I just come out of the salt house.

Q. You had just come out of the salt house, you think? A. Yes.

Q. You had been down there, you believe? [826]

A. To show the other boys where the salt was I wanted up on the dock.

Q. And what had you been doing before you went to the salt house?

A. I don't know just what you mean by that question.

Q. Well, what had you been doing? I mean, you apparently were giving these boys instructions on what to do, isn't that right? A. Yes.

Q. And you saw them fill one bucket?

A. No, I didn't see them fill the bucket.

Q. You didn't wait, you just told them what to do and took off? A. I went out.

Q. Where did you go? Did you go out this door that you have talked about?

A. I went out this door——

Q. Beg your pardon?

A. ——to the salt house.

Q. You went down to the salt house?

A. Yes. It is right beyond that door.

Q. You came back——

A. As I came back, they were coming back with the empty bucket they had.

(Testimony of Robert C. Fincher.)

Q. They were coming back with the empty bucket? [827] A. Yes.

Q. Where did you first see them?

A. Right there at the end as they come through the cars.

Q. As they came through the cars?

A. Yes.

Q. And tell us how they came through the cars.

A. Well, I don't just remember how they did, whether they come under them.

Q. Beg your pardon?

A. I don't just remember exactly how they come through. I seen they were going between them and I told them not to.

Q. You saw both of them come under the coupling?

A. No, I didn't see them. They were coming out from between the cars when I seen them. Whether they went under the coupling or over it, I couldn't swear to that.

Q. But both of them came out together?

A. Now I ain't sure whether they both come out or whether one was already out when I seen them.

Q. Who was carrying the bucket?

A. I don't remember that, either.

Q. Was one or the other, or were they both carrying the bucket?

A. Might have been both carrying it, I don't just remember. [828]

Q. All right, and then did you have a conversation with them? A. Yes.

(Testimony of Robert C. Fincher.)

Q. All right, tell us what you said and what they said.

A. I just told them not to go through them cars; that they might drop some cars in there and they would get hurt. And I don't just remember what they said, whether they said anything back or not.

Q. Well, when you started the boys out on this job, did you see them go between these cars?

A. No, they were coming back when I seen them.

Q. I see. You didn't see them go between any cars?

A. I didn't see them go between them going over there when they emptied the bucket, no.

Q. And you didn't see them come between them when they came back, is that it?

A. They were just coming out from between the cars when I seen them. I forget which one, whether they both was coming through there or just one.

Q. When you spoke to them about coming through the cars, did you say, "You shouldn't come under the cars," is that what you told them?

A. I don't remember my exact words, but—

Q. What did you tell them to do with the slush then?

A. I told them to go around the end of the cars.

Q. You told them to go around to the end of the cars?

A. Yes.

Q. What did they say?

A. I don't remember just what they said.

Q. I see.

A. Whether they said they wouldn't or not.

(Testimony of Robert C. Fincher.)

Q. I see. How long was this after you had given them their first instructions that you saw them? Almost immediately after that? A. No.

Q. How soon after you instructed them down in the ice room or where the slush was to go out and take this slush out, how soon was it that you saw them this first time coming back that you are talking about?

A. Oh, it wasn't very long. I couldn't say just how many minutes.

Q. Well, do you know how many buckets they had carried or anything like that?

A. No, I think it was the first bucket, but I wouldn't swear to it.

Q. You think it was the first bucket?

A. Yes.

Q. And you then told them—what did you tell them to do? Did you give them some other instructions?

A. I told them not to go through them cars, to go around [830] them cars.

Q. Not to go through the cars, but to go around them? A. Yes, to go around them.

Q. All right. What did they say?

A. I don't remember just what they said.

Q. All right. Well, then, what did you do then after you gave them the instructions? This is right in front of the shed, I gather, that you talked about?

A. Well, I went on up and started running the hoist.

(Testimony of Robert C. Fincher.)

Q. You started running the hoist of the salt gig, is that right?

A. I had to go up on top of the dock to do that.

Q. I see. Did you see either Gerry Stintzi or this other boy, Allan Maine, again?

A. What was the question?

Q. Did you ever see them again that evening?

A. Oh, yes, I seen him after he was hurt.

Q. After he was hurt?

A. And talked to Maine, talked to the Maine boy.

Q. But between the time that you saw them coming through the cars the first time and the time that the boy was hurt, you didn't see them again?

A. No, where you run the hoist is kind of boarded up. You stand in there, well, there is a window out on the north side that you can look out.

Q. Well, Mr. Fincher, isn't it the fact that you didn't warn these boys at all and you never ever saw them coming back under the coupler?

A. It is a fact that I did see them coming back and I warned them.

Q. And that happened right when they started the work, is that it?

A. Yes, sir, right just about that time.

Q. Did you tell them when you directed them to do the work, did you tell them right at that time not to go between the cars?

A. No, sir, I told them after I seen them coming back through the cars.

Q. In other words, you didn't tell them how——

(Testimony of Robert C. Fincher.)

A. Before I went out there, I didn't know that there were any cars there.

Q. I see.

A. You had to go out there first to see whether there is any cars there.

Q. You say you didn't know there was a string of cars out there?

A. No, sir, not until I went out.

Q. Not until you went out?

A. No, how would I know?

Q. And as I gather it, after you gave these boys their [832] instructions, you went down to the salt house and then you came back and saw them coming out from between the cars, and it wasn't until then that you went up and started to run the salt gig?

A. Yes, sir.

Q. Is that right? A. That's right.

Q. And what time was that?

A. Well, it was between 7:30 and 8 o'clock, I imagine. I don't remember just exactly the time.

Q. It was between 7:30 and 8 o'clock? A. Yes.

Q. And it was about an hour later that this boy was injured, wasn't it?

A. I don't know whether it was an hour or not quite.

Q. Well, it was three-quarters of an hour, wasn't it 8:15?

A. It might have been, it was sometime after 8 o'clock.

Q. Sometime after 8 o'clock? A. Yes.

Q. Three-quarters of an hour?

(Testimony of Robert C. Fincher.)

A. Just getting dusk.

Q. Beg your pardon.

A. It was just getting dusk.

Q. What time do you turn the lights on up there, Mr. Fincher? [833]

A. Well, just as quick as it gets dark.

Q. All right, when did you turn them on that night?

A. Well, I don't remember just exactly when we turned them on.

Q. Well, where do you turn them on at?

A. To turn the lights on 13, you have to walk up the dock to the center of the dock.

Q. To turn them on where?

A. To turn them on the north side of the dock. But on the south side, you can turn them on right from this end.

Q. All right, when did you turn the lights on?

A. I don't remember what time I turned the lights on.

Q. Now you don't recall, then, what time you turned the lights on or on which side, is that idea?

A. Well, we turn them on 12 first when we turn the lights on.

Q. You turned the lights on on 12; what was going on on 12? A. Nothing.

Q. Well, how many cars were there along 12?

A. I don't think there were any.

The Court: We will suspend now until 9:30 tomorrow morning. Remember, we will come back again at 9:30 tomorrow morning. We will be ready

(Testimony of Robert C. Fincher.)

for you in the morning, I'm sure, won't keep you sitting around. [834]

Court will adjourn until tomorrow morning at 9:30.

(Whereupon, the trial in the instant cause was adjourned until 9:30 o'clock a.m., Friday, July 2, 1954.) [835]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

ROBERT C. FINCHER

having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Etter): Mr. Fincher, on the evening of July 17th of 1952, do you remember when it was that any lights were turned on on the icing dock? I have reference now to the overhead illuminating lights.

A. No, I don't just know what time they were turned on.

Q. You don't know?

A. No, not exactly.

Q. Do you know who turned them on?

A. No, I don't.

Q. Beg your pardon? A. No.

Q. Do you have charge of that particular phase of the activity? [836]

(Testimony of Robert C. Fincher.)

A. No, anybody might come along and turn the lights on.

Q. At any time, is that—— A. Yes.

Q. Is that your testimony. Do you remember when they were turned on then?

A. No, I don't, not exactly.

Q. Do you remember when it became dusk out there? A. Well, along about 8:20.

Q. Along about 8:20?

A. After 8 it starts to get dusk.

Q. Well, ordinarily, if men are working out there on the ice dock or they are there for employment, is it customary to turn the lights on when it starts to get dark? A. Yes, sir.

Q. And is it your best recollection that the lights were on then at 8:20 or thereabouts?

A. Well, they might have been turned on about that time.

Q. Well, were the lights on, do you know?

A. I couldn't swear to that.

Q. Well, you were working over on the salt gig at that time, weren't you? A. Yes, sir.

Q. And were you working in the dark, would that be a fair statement, or were the lights on? Could you see what [837] you were doing?

A. Yes, I could see what I was doing.

Q. There were men working down in the salt pit, I think you said five or six or seven, you didn't know how many?

A. No. But they have their own lights down there in the salt pit.

(Testimony of Robert C. Fincher.)

Q. They have their own lights down there in the salt pit? A. Yes.

Q. But you were handling the salt up on the dock, isn't that correct?

A. I was running the elevator.

Q. You were running the elevator?

A. Yes.

Q. Bringing salt up and trucking it down the dock? A. Yes.

Q. And you don't know whether the lights were on, though?

A. Well, if it was dark enough, the lights were on.

Q. Well, was it dark enough? When did you customarily turn them on?

A. Well, just as quick as it starts getting dark, we will turn the lights on.

Q. Just as quick as it starts getting dark?

A. Yes.

Q. Would it be a fair statement, then, to say that in all [838] probability the lights were on?

A. Yes.

Q. Is that correct? A. On 12, not 13.

Q. Oh, not on 13? A. Not right away.

Q. Can you tell us why they weren't on on 13?

A. Well, we hardly ever, unless we are using Track 13, lots of times we don't turn the lights on on 13.

Q. You don't turn them on?

A. No, if we are just putting out salt or something, we just have lights on 12.

(Testimony of Robert C. Fincher.)

Q. Just have them on 12? A. Yes.

Q. Of course, you just iced a car or iced a train at 4 o'clock that you had split and put half on 12 and half on 13; isn't that right?

A. We wouldn't have the lights on at that time of day.

Q. I know but you had split the train on both tracks, isn't that right?

A. Well, they generally do.

Q. And your testimony is, then, that the lights were not on on Track 13?

A. That is what my best recollection is, no, I don't believe they were on on 13, but they probably were on 12. [839]

Q. Beg your pardon?

A. The lights on the south side of the dock, but I don't believe they were on the north side of the dock.

Q. It was on the north side of the dock, however, that you were carrying on practically all of the activities at the time of this accident, isn't that true?

A. No.

Q. What were you doing on the south side?

A. Well, the lights on the south side lights up the dock enough so you don't need the other lights on to be working on the dock.

Q. Well, what was the purpose of having them on at that time on the south side of the dock?

A. Well, we were trucking salt up the dock.

Q. But you were bringing salt up on the north side, isn't that right?

(Testimony of Robert C. Fincher.)

A. Well, yes, it is on the north side, but then——

Q. Your salt pit is on the north side?

A. The salt is right square under the center of the dock.

Q. In the center of the dock, but the pulley that brings it up is on the north side, isn't it?

A. Yes, it is—well, no, the end of the gig is just about the center of the dock. Where they take the salt off the elevator is right about the center.

Q. Well, now, I call your attention to Exhibit No. 9. [840] Over to the left on the north side, is that not the salt shed?

A. The salt shed where the salt is is under this (indicating). This is where it comes up, but they take the salt off here. That is pretty near the center of the dock.

Q. Were you——

A. This chain is in the center.

Q. Just a moment, please. Isn't the salt brought up on a chain, elevator-type, to this building right here (indicating)?

A. No, it is brought up, it is put on and hoisted up the cable.

Q. Hoisted up where, into this building (indicating)?

A. No, in the next building—no, between the two here (indicating).

Q. All right, between the two? A. Yes.

Q. But on the north side of the dock, isn't it?

A. Yes, but they have to take it off right there and that is about the center. That is where they

(Testimony of Robert C. Fincher.)

pull the salt off. They can't take the salt off either side.

Q. Well, take this No. 16, this is a view, of course, along on the north side. Now can you tell me what side of the dock that shed is on? [841]

A. That is on the north side.

Q. On the north side. And where is this opening in the salt shed?

A. That comes up just about the center of the dock.

Q. Center of the dock?

A. Pretty close, it is just to the left. That is where they take the salt off the hoist is right there (indicating).

Q. It is taken off the hoist right between these two buildings? A. Yes.

Q. Is that correct?

A. But it is taken out of the end, you can't take it off either side.

Q. Well, now, so we aren't quibbling here, isn't the operation carried on from the salt shed, the opening of which is on the north side, and the shed itself is on the north side of the dock?

A. The shed is on the north side of the dock.

Q. Isn't that correct? A. Yes, sir.

Q. As it appears in these two photographs. It isn't in the center at all, is it?

A. No, but the men stand almost in the center of the dock taking the ice off the elevator. [842]

Q. If this building, Mr. Fincher, were over here

(Testimony of Robert C. Fincher.)

by this light which appears on the south side, would you say it was in the center?

A. No, I didn't say the building is in the center, I say where the men working taking the salt off, they are working almost in the center of the dock.

Q. They are working in the center of the dock?

A. Yes.

Q. So the thing to do, then, you feel, is to have the lights on on the south side rather than the north side?

A. Well, we generally turn them on there, yes.

Q. In other words, when you work on the north side, you use the lights on the south side, is that the idea?

A. No, sir, we don't work—mostly the work was on the south side of the dock.

Q. All right, what was going on on the south side of the dock?

A. That is where they wheel the salt, on the south side.

Q. They wheel it down the south side?

A. Yes.

Q. You don't wheel any on the north side?

A. Yes, at times we do.

Q. Well, were you doing it this time?

A. I don't just remember whether we were putting any there at this time or not, but it is mostly on the south side. [843]

Q. You had a fruit train brought in to the icing dock at about 4 o'clock on the afternoon of the 17th, is that correct, sir?

(Testimony of Robert C. Fincher.)

A. I think it is, if I remember right.

Q. Well, do you remember?

A. Well, that is two years ago, I can't just remember exactly what time that train was there.

Q. Well, was it there sometime in the afternoon between 3 and 5?

A. Let's say that I suppose it was, yes.

Q. Well, was there a fruit train come along?

A. If the records show there was one, there was one there, yes.

Q. And how was that iced, Mr. Fincher, on what track or tracks?

A. Well, sometimes they split them and put part of them on 13, and other times they just pull them into the track and pull them straight ahead on the same track. There is different ways.

Q. What happened that day?

A. I don't just remember whether they split the train or whether they pulled it ahead.

Q. Do you know whether or not there was any icing operation on Track 13 that afternoon?

A. I couldn't swear that there was, no. [844]

Q. Do you know whether there was any on 12?

A. Yes, there was icing on 12.

Q. Of the whole train?

A. That time of the year we always have icers.

Q. Was the whole train on there?

A. I don't remember whether the whole train was there or not.

Q. Well, if you had a train of approximately 56 cars, could you put it all on that track for icing?

(Testimony of Robert C. Fincher.)

A. Now we ice about 28 at a time, then they may pull ahead, or they may come and set them over. It is just according to the yardmaster's orders.

Q. What did you do that day?

A. I don't just remember whether they was pulled or whether they was set over.

Q. Do you keep any records out there of where cars are iced or how they are iced, on what track they are iced?

A. No, but I think the railroad does. We don't keep no records, we just keep——

Q. You don't keep any records?

A. No, just what cars.

Q. You don't remember much of what happened that day?

A. Well, I don't remember everything that happened, no.

Q. Well, don't you remember whether you iced cars on Tracks 12 and 13? [845]

A. Well, I suppose we did, yes.

Q. Well, as a matter of fact, you know that you did, don't you?

A. I couldn't swear we iced any on 13.

Q. I see. When were you told or when were you informed that a fruit train was coming to be iced on the afternoon of July 17, 1952, if you were told?

A. Well, we generally get orders from the yard office an hour before train time.

Q. Hour before train time?

A. As a rule, how many cars is on the train to

(Testimony of Robert C. Fincher.)

be iced, and so on, and we try to have our ice on the dock in order.

Q. Do you get those orders from the superintendent?

A. We get them from the ice foreman.

Q. From the ice foreman? A. Yes.

Q. How does he give them to you?

A. Over the phone.

Q. Over the phone?

A. Sometimes, maybe, he will send a helper down and he tells us what is coming.

Q. And your testimony is that the ice foreman advises you of the arrival of a train?

A. Yes, he generally gives us—— [846]

Q. Does he tell you how many cars?

A. ——an hour's notice of how many cars and how many is to be iced.

Q. How many are to be iced? A. Yes.

Q. Does he tell you where the cars are going to be spotted?

A. Yes, he generally does, the train is going into the yard or into the dock.

Q. All right, does he tell you what track they are going to put them on? A. Yes, sir.

Q. How does he give you this order, over the phone orally or does he confirm it with a written instruction?

A. He gives that over the phone.

Q. He gives it to you over the phone?

A. Yes.

(Testimony of Robert C. Fincher.)

Q. Always calls up before the arrival of one of these trains?

A. Unless they slip in and he don't know anything about it, then they wouldn't, but if he knows a train is coming in. Once in awhile they come in without a call, other times they won't.

Q. Well, then, you have been out there, have you, when fruit cars, refrigerator cars, have slipped in there [847] without any word from the ice foreman?

A. Yes, sir. Once in awhile a train will come in ahead of time or something where you don't get no call on.

Q. They don't get any call and you don't get any call?

A. No. Of course, if they don't get one, why we don't have one.

Q. Certainly not. In other words, they just come in without either one of you knowing about it?

A. Sometimes they do that.

Q. That has happened a number of times since you have been the foreman up there?

A. Oh, not too many times, once in awhile.

Q. I see. And how is it you know that there is a bunch of fruit cars? They just bring them on in, is that the idea?

A. No, they come in the yard, well, then the ice foreman knows after they are in the yard whether they ice or not, then he phones to me and tells me.

Q. What I am talking about are these times where they slip a car or two for icing in there that

(Testimony of Robert C. Fincher.)

you haven't been told about and that the ice foreman apparently hasn't been told about.

A. Well, he will be told before them cars are there very long.

Q. Before they are where very long? [848]

A. In the yard any place. He knows whether they are going to be iced or not.

Q. In other words, then, your testimony, if I understand it, is that they may get into the yard without you or the ice foreman knowing it, but they never get up alongside your dock without your being informed?

A. No, they might set some in there before we are informed that they are to be iced, yes.

Q. Well, I would like to get it straight. I am trying to find out if any icing cars or refrigerator cars, whatever you want to call them, are ever put in on Track 12 or 13, or have been put in on Track 12 or 13, without notification to you beforehand?

A. Oh, yes, they are put in there lots of times, and then I am notified that they are there and come over and ice them.

Q. You are notified that they are there?

A. Yes, after they are there.

Q. I see.

A. But that is different than the regular train. When the regular train is coming in, why then we are notified ahead of time.

Q. You are always notified ahead of time?

A. Most always, unless something happens.

(Testimony of Robert C. Fincher.)

Q. Now when you were notified on the afternoon of the 17th [849] that a fruit train was going to be in the yard for icing, what did you do? I mean, what is your procedure down there on that dock?

A. Well, we start putting the ice out on the dock. It takes quite a little while to run that ice on the dock.

Q. All right.

A. The dock is long and it is quite a little ways to the dock from the plant, and we have to run our ice over there and get it out and have it ready there when the train comes in.

Q. What else do you have to do?

A. That is all, just get our ice out there and get it ready.

Q. What do you do, just put the ice in there without any salt?

A. We put the ice on the dock.

Q. What do you do——

A. Spot it, spot so many cakes off for a certain car. You figure how many cakes, what these cars are going to take.

Q. I see.

A. Spot so many cakes of ice there. Well, the salt is already sitting there, already there.

Q. You always have salt up there, do you?

A. We always aim to keep salt on the dock scattered all [850] along.

Q. Any time we go out there to that dock, there would always be salt there?

A. There is always salt there somewhere. Gen-

(Testimony of Robert C. Fincher.)

erally put it at each light, that is about the end of each refrigerator car.

Q. So this chain, of course, that conveys it goes the whole length of the icing dock, does it?

A. Yes, we have two chains there.

Q. That icing dock is about 1,300 feet long, isn't it?

A. I believe it is about 28 cars long, 28, 29.

Q. Beg pardon?

A. Just about 28, not quite 29.

Q. It is almost a quarter of a mile long, isn't it?

A. Yes, about 1,500 feet, just guessing at it.

Q. And the ice is taken all the way up to points where those cars may be spotted? A. Yes.

Q. That is, of the 28 or 29 cars, for the purpose of having everything in preparation for icing?

A. Yes, sir.

Q. Is that right?

A. Ice is got out there ahead of time, if we have time to get it there.

Q. Now on the afternoon, you had iced a car or iced a train, [851] isn't that correct?

A. Yes, sir.

Q. And after you finished icing the train, you still had enough salt left along that 1,300 foot dock so you didn't need any more for any trains that day?

A. No, sometimes we use it all. It is according to the cars. Sometimes cars will take six or eight, ten sacks of salt, so we never leave over five in a place, five or six.

(Testimony of Robert C. Fincher.)

Q. You had iced this train sometime between 4 and 6 o'clock or 4 and 6:30 in the afternoon of the 17th? A. Yes, sir.

Q. When were you notified of the arrival of another fruit train?

A. Well, I just can't remember that.

Q. When did you have another one in that day?

A. I don't remember whether we had one that day or not. We might have had a few cars.

Q. You had one at 9:35, as a matter of fact, that night, didn't you?

A. I believe we did, if I ain't mistaken.

Q. Well, now, do you know whether you ever received any instructions that an entire fruit train was going to be in there at 9:35 that day?

A. If there was one come that day, I received the [852] instructions, yes.

Q. Well, now, Mr. Fincher, do you know whether or not a fruit train was iced there at night at 9:35 that night?

A. If the records show it was, it was, yes.

Q. How long have you been sitting here in the courtroom? A. I came here yesterday.

Q. Well, you heard the official from the Northern Pacific testify from his records that a fruit train was in there at 9:35, didn't you?

Mr. Cashatt: Object to that, your Honor. That was not a fruit train. The records show it was one car and that they didn't ice it.

The Court: Well, I will sustain the objection.

Q. (By Mr. Etter): Was there a train or a car

(Testimony of Robert C. Fincher.)

or anything in there to be iced at 9:35? The records will indicate what it was.

A. I couldn't swear if there was.

Q. Beg your pardon?

A. I couldn't swear to that, no.

Q. Were you notified at all that there was going to be a car or a train in there at 9:35?

A. If there was one in there, I would have been notified, yes.

Q. Well, now, at 8:20 you were up there on the salt gig bringing salt up, isn't that right? [853]

A. Yes, sir.

Q. What for?

A. Just we were scattering salt along the dock. We have got to keep that salt, we don't when when there will be a train in there. There is no regular time for them freight trains to run as a rule, they may come in any time day or night.

Q. So you were up there getting salt on the north side of the dock?

A. We have to scatter that salt out. Whenever it runs shy, we aim to put it back, keep it there all the time in case.

Q. All right, as you were bringing the salt up on the salt gig, where were you taking it after you got it up on the dock?

A. We scattered it all along the dock.

Q. The whole 1,500 feet of the dock?

A. I believe we did at that time. Now we have a salt house on the other end that we don't—

(Testimony of Robert C. Fincher.)

The Court: Just what you did then, let's not go into what you do now. Go ahead.

Q. (By Mr. Etter): Were you placing the salt on the north and south sides?

A. We probably were, both sides.

Q. Both sides of the dock? [854]

A. But as a rule we use a whole lot more on the south side.

The Court: Just what you did then. Don't answer such long answers. Answer the questions directly and simply.

Q. (By Mr. Etter): Were you unloading the salt on both the north and south sides of the dock?

A. I suppose we were.

Q. You suppose you were. How many men did you have on shift that night in your crew, Mr. Fincher?

A. Well, that is hard to say just how many men.

Q. Well, Mr. Fincher, you are the foreman there, do you keep records? Does Addison Miller have any records of the people who worked that shift?

A. Yes, sir, they have them in the timebook.

Q. Beg your pardon?

A. They have the timebooks, but then maybe one day we have got 20 men, maybe the next day we have only got 10.

Q. All right, do you know how many you had on the 17th of July, 1952 on the shift from 3 to 11?

A. I couldn't swear to that just exactly, no.

(Testimony of Robert C. Fincher.)

Q. Well, did you examine your records to determine how many men you had working for you after you were subpoenaed to appear here as a witness for the defendant?

A. I never looked at the records to see how many men we [855] had.

Q. Did you check anything that happened on the 17th by any records you have prior to coming here to court?

A. No, sir, I don't have the timebook. I just keep the time for that day and the foreman puts the time down in the timebook.

Q. And you don't know how many you had working on that shift?

A. I couldn't swear to that, no.

Q. Could you approximate it for us?

A. Well, I would say there was 20.

Q. There were 20?

A. Yes, I would say maybe there were 20 or more.

Q. Did you check to find out any of the names of any of these men?

A. I check them when I come to work.

Q. I mean before you came here to testify?

A. No, sir.

Q. You said at the beginning of your testimony that when you came through the tunnel, that you stopped in the shed, as I understand it, right by the slush pit with about 15 men?

A. Yes, sir, something like that.

(Testimony of Robert C. Fincher.)

Q. Have you checked to determine who any of those 15 men were? [856]

A. I check the men when I go to work to see whether they are there or not, at 3 o'clock.

The Court: The question is whether you checked before you came down here. He says he didn't check.

Q. (By Mr. Etter): You checked——

The Court: He says he didn't check at all on anything.

Q. (By Mr. Etter): You didn't check the names?

A. No, sir.

Q. All right. All you remember is that Allan Maine and Gerry Stintzi were two of the men?

A. No, I can remember some of the other men that was there, too.

Q. All right, tell us who they were.

A. Well, there was one by the name of Johnson.

Q. Johnson, all right?

A. And Jerome, I believe.

Q. Jerome.

A. And I don't just remember how many of the regular men that works there the year around.

Q. And those men were all given their instructions on what to do in the section of the ice house where the slush pit is located as indicated in one of the exhibits? That is where you gave the instructions? A. I believe it was, yes. [857]

Q. All right. And as I understand you, you didn't go up on the dock?

A. Yes, I had to go—no, after I had given the

(Testimony of Robert C. Fincher.)

instructions, I had to go up on the dock to run the hoist.

Q. I thought you went out the door, after you gave the instructions, and down to the salt pit?

A. Well, yes, but then I had to come back and go up.

Q. You testified yesterday that you didn't turn the blue lights on for anything except icing cars?

A. And unloading salt.

Q. And unloading salt? A. Yes.

Q. So I take it if there is any salt unloading going on, you use the blue lights then, too, is that correct? A. That is, yes.

Q. Beg your pardon?

A. If it is at night, we use them, but we hardly ever unload at night.

Q. You know about the phone system between the Addison Miller dock and the yardmaster's office? A. Yes, sir.

Q. You know there is a loudspeaker system in the yards, do you not?

A. There is, but we never use that.

Q. You never use it? [858] A. No, sir.

Q. Have you ever used it in all the time you have been a foreman?

A. I have never used it since I have been there.

Q. I see. Has the Northern Pacific ever used it with reference to advising you or any of your men of the movement of cars?

A. That loudspeaker is put there for the railroad use.

(Testimony of Robert C. Fincher.)

Q. I am asking if you recall that the Northern Pacific has ever used it for the purpose of advising you or any of your men of the movement of cars?

A. No, I don't think so.

Q. Have they used it for any other purpose of advising you of anything?

A. No, they never use that to advise us.

Q. And, of course, neither the phone system nor the loudspeaker system was used on the 17th to advise you of anything? A. No.

Q. In your testimony the other day you indicated that in the 10 years you have been there, that you have dumped and your men have dumped empty salt sacks over on this dumping area north of Track 13?

A. Just since we have got the paper sacks.

Q. How long has that been? It was prior to 1952, wasn't [859] it? A. Yes.

Q. And how long has that been?

A. I couldn't just swear when we did start getting the paper sacks, but when we used burlap sacks, we saved those.

Q. You save those, but you have had paper sacks for several years? A. Yes.

Q. You take those over north of Track 13 and dump them in that dumping ground?

A. Yes, sir.

Q. How long have you dumped slush ice over there?

A. Ever since I have been there.

Q. Ever since you have been there?

(Testimony of Robert C. Fincher.)

A. Yes.

Q. Taken the slush ice over and dumped it in the same place, is that correct? A. Yes, sir.

Q. And that is what you instructed these two boys to do? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. All right. Tell me this, Mr. Fincher, when these men came to work, did you ever tell them anything about the [860] blue lights that were up on the dock?

A. I don't know as I did, no.

Q. Did you ever instruct them as to the purpose of those blue lights, if they had a purpose?

A. Yes, I think they knowed what them blue lights were there for.

Q. I didn't ask you if they knew, I asked if you instructed them and told them about it?

A. I don't know that I did, but at night I always turned them on.

Q. Beg your pardon?

A. When we ice cars at night, I always turned the blue lights on.

Q. I see. And when you were unloading salt?

A. Yes.

Q. I see. Did you ever advise Gerry Stintzi or Allan Maine or Joe Vallarano, or these people that have testified here, about those blue lights?

A. No, I don't think so.

Q. Beg your pardon? A. No.

Q. Now, Mr. Fincher, do you recognize this man who is seated right here behind me?

(Testimony of Robert C. Fincher.)

A. No, sir.

Q. Have you ever seen him before? [861]

A. Not that I know of. I might have.

Q. Well, don't you recall that prior to the forepart of August of 1952, that you talked to a man by the name of Day?

A. Oh, yes, now I remember. He just come out and said a few words to me.

Q. Do you remember having a conversation with him? A. Yes.

Q. Now referring, Mr. Fincher, if I may, to a time right after the 1st of August, probably between the 1st and 7th of August, do you recall having a conversation with Mr. Day out at the Addison Miller dock?

A. Yes, sir, I do now since you mentioned it.

Q. You believe you do?

Mr. McKevitt: That is 1952?

Mr. Etter: 1952.

A. Yes.

Q. Do you remember whether anybody was present except you and Mr. Day?

A. Well, we didn't—he didn't only just ask me just one question, I believe.

Q. Well, I will ask you if Mr. Day asked you, in substance and effect, whether or not the blue lights were on on your dock just prior to the time of the accident which occurred to Gerry Stintzi? Did he ask you that [862] question?

A. That is what he asked me, and I told him no.

(Testimony of Robert C. Fincher.)

Q. And your answer at that time was no, isn't that correct? A. Yes, sir, that's right.

Q. Do you remember that?

A. Yes, I remember it now.

Q. And do you remember then that he asked you the question why hadn't you put up the blue lights?

A. He said he wouldn't ask me any more questions.

Q. No, just answer that, did he ask you that, in substance and effect, why was it you didn't have the blue lights up? A. I don't think so.

Q. You don't think so? Would you say no?

A. No, he didn't.

Q. All right. I will ask you whether or not at that time when you were talking with Mr. Day, referring to the fore part of August as I have indicated in my previous questions, he didn't say to you, or you didn't answer him when he asked you the question why you didn't have the blue lights up, if you didn't answer him, in substance and effect, as follows: "Well, first, we weren't expecting any switch, and, second, I don't think the blue lights are of good enough quality to be seen, anyway." I will ask you if you made that statement to Mr. [863] Day?

A. I don't believe I did.

Q. Well, now, will you say that you didn't?

A. Yes, I think I will say I didn't.

Q. You will say that you didn't.

The Court: I think the record here should show it is 10 o'clock and there has been set for hearing

(Testimony of Robert C. Fincher.)

at this time a matter in connection with the bankruptcy proceeding of S. P. Beecher. It is an order to show cause why personal property should not be removed from the premises at Peshastin in the matter of S. P. Beecher, and I will not take it up at this time. I will take up that matter at 11 when it is time to recess, and anyone here in connection with that, attorneys or anyone else, will be excused until 11 o'clock.

All right, go ahead.

Q. (By Mr. Etter): You have stated you didn't give those answers to Mr. Day, is that correct?

A. I ain't positive now.

Q. Beg your pardon?

A. I am not positive what happened, what Mr. Day said.

Q. You are not positive. May I assume that you could have possibly given that information in the form of those answers to Mr. Day?

A. I might have said something, but—— [864]

Q. You might have? A. But he——

Q. But if you mentioned the fact that the blue lights weren't of good enough quality to be seen, anyway, you might have mentioned that, will you tell us why?

A. I don't believe that I did say they wasn't. I might have said you couldn't see them blue lights very far during the daytime.

Q. Didn't you say, as a matter of fact, you couldn't see them, anyway, even if you had them on? Isn't that what you said?

(Testimony of Robert C. Fincher.)

A. No, I don't think so.

Q. Well, what was it you said about the blue lights, now you tell us?

A. I don't know just exactly what I said about them. He asked me if the blue lights were on and I told him no.

Q. Then what else did he say now, if you remember anything else?

A. He said that he wouldn't ask me for any statement because he didn't want me to swear to something that I would have to——

Q. As a matter of fact, didn't Mr. Day ask you if you would give him a statement to that effect? Isn't that what happened?

A. I don't believe he asked me if I would give him a [865] statement.

Q. And, as a matter of fact, in answer to that, didn't you say that no, you couldn't give him a statement because you had been told not to, and that if you did, it would mean your job; isn't that what you told Mr. Day?

A. No, sir, no, sir.

Q. All right, what did you tell him?

A. I didn't tell him that at all.

Q. What did you tell him, then?

A. I never told anybody it would be my job if I told him.

Q. Well, Mr. Fincher, what was it you told him?

A. I told him the blue lights were not on.

Q. They were what?

A. The blue lights were not on when——

(Testimony of Robert C. Fincher.)

Q. Were not on?

A. Were not on, when he asked me if the blue lights were on, and I told him no.

Q. And what else did you have to say about the blue lights?

A. I don't remember whether there was anything more said about them or not.

Q. Well, I am merely trying, if I can, to refresh your recollection as to this conversation. I have inquired and I don't want to repeat myself. Am I to assume that you don't remember, is that it? [866]

A. That is it, yes, sir.

Q. And you are not sure of what happened or what was said?

A. Yes, sir.

Q. Is that correct?

A. That probably is.

Mr. Etter: That is all, sir.

Redirect Examination

Q. (By Mr. Cashatt): Mr. Fincher, this chain that you mentioned that brings the ice up, does that run the full length of the dock?

A. No, we have two chains. One runs to the center house and then we have another chain from there on.

Q. When those chains are running, do they make any noise?

A. Oh, yes, they make quite a lot of noise.

Q. And you say the dock is about 1,300 feet long?

A. I judge it is between 13 and 1,500 feet.

(Testimony of Robert C. Fincher.)

Q. Now where do you turn on the lights, the white lights, for that dock?

A. You turn the lights on 12 on this end and you go to the center house for the rest of the lights. That is the center of the dock.

Q. You turn the lights——

A. For the south side.

Q. For Track 12? [867]

A. On this end.

Q. On the west end?

A. That turns them on to the center house, but you have to go to the center house to turn the rest of the lights on from there to the other end of the dock.

Q. When the white lights are on the dock at night, Mr. Fincher, what work is usually being carried out there?

A. Well, lots of times we are putting up salt, that is about all, unless we are icing cars, and we would have the blue lights on, too, if it is dark.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. Etter): Well, Mr. Fincher, regardless of the position of your lights that night, you weren't expecting a switch of cars into there when they came in at 8:30, were you?

A. Yes, they may push cars in there any time if we ain't got the blue lights on.

Q. Didn't you tell Mr. Day that you weren't expecting a switch at that time? A. No, sir.

(Testimony of Robert C. Fincher.)

Q. You didn't say anything like that to him?

A. No, sir.

Q. You are sure of that? [868]

A. I am sure of that.

Mr. Etter: That is all.

Mr. Cashatt: That is all.

The Court: All right, call the next witness.

(Witness excused.)

Mr. Cashatt: Mr. McCartney, please.

R. J. McCARTNEY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): State your name, please.

A. R. J. McCartney.

Q. And you live in Spokane, do you?

A. Just out of the City of Spokane.

Q. How long have you lived in this area?

A. About 46 years.

Q. And what is your occupation?

A. Ice foreman.

Q. For what company?

A. Northern Pacific Railroad Company.

Q. And how long have you been ice foreman for Northern Pacific Railway?

A. About 20 years. [869]

Q. And what shift do you work?

A. Daytimes, 8 until 4.

(Testimony of R. J. McCartney.)

Q. Mr. McCartney, handing you Exhibit No. 39, do you recognize that exhibit?

A. That is a record that I keep of salt unloaded into the salt houses.

Q. And the handwriting on that exhibit, is that your handwriting? A. All mine.

Q. And the first sheet, Mr. McCartney, I notice on the left-hand side it begins with January and winds up with December and has dates set forth after those months. Tell us what that column on the left hand indicates.

A. That is the dates that I have asked for carloads of salt to use in icing at Yardley. That is my request for salt for the year of 1952, and the dates are the dates they were supposed to come on or approximately.

Q. Keep your voice up, please.

A. Approximately the date that they are supposed to come.

Q. And I notice, Mr. McCartney, opposite the date of July 15th there are other notations. The one I refer to particularly is G.N. 20206. Do you see that location? A. Yes, sir.

Q. Now did you write that number there?

A. Yes, sir. [870]

Q. And what is that?

A. That is a carload of salt that arrived.

Q. Louder, nobody can hear you.

A. That is a carload of salt that arrived on July the 16th and was unloaded on July the 16th into the salt house.

(Testimony of R. J. McCartney.)

Q. And when on July 16th? Did you put that designation on Exhibit No. 38? Excuse me, 39?

A. This car number was written in the day that the salt arrived, and the date I show there, arriving date, and then when they unloaded at the salt house, I put the date unloaded so I can keep track of how many cars I have on hand and when they are unloaded.

Q. Now I see that it shows arrived 7-16 and unloaded on 7-16, is that right? A. Yes, sir.

Q. Now following that, the next designation is P. & E. 3835. Does that indicate a carload of salt?

A. That was a carload of salt that arrived on July the 18th and we unloaded it on July the 18th.

Q. And it shows the arrival date, July 18th, and the unloaded date, July 18th?

A. Yes, sir.

Q. From that record, is there any car of salt that arrived on July 17, 1952 and was unloaded on July 17, 1952? [871]

A. No, we didn't have a carload of salt in the yard on July the 17th, 1952 to unload.

Q. And for what reason and what purpose do you keep the record, Exhibit No. 39?

A. We keep the record so that I know how much salt I have on hand, and I keep the arrival date and the unloading date so that we can keep track of—not keep them too long and have too per per diem.

Q. Well, now, the last answer you gave, I see the first car on July 16th, the car on July 16th is G.N.

(Testimony of R. J. McCartney.)

Does that mean it was a Great Northern Railway car?

A. That means it was Great Northern, belonged to the Great Northern Railway.

Q. And the next one I see is P. & E. Does that indicate another railroad line?

A. That belongs to the P. & E.

Q. A little louder, please.

A. That belongs to the P. & E. Railroad, that car does.

Q. And while the Northern Pacific Railway has those cars at its yard in Yardley, do they have to pay anything to the other line, the Great Northern or the P. & E., for the car? A. They do.

Q. And is that the reason you keep the date of arrival and the date unloaded? [872]

A. Yes.

Mr. Cashatt: You may inquire.

Cross Examination

Q. (By Mr. MacGillivray): Mr. McCartney, during the summer months at Yardley yards, you always have on hand and available a car or cars of salt, do you not? A. Sometimes.

Q. Well, don't you always during the busy summer months?

A. Well, at that time we didn't have. We were using it as fast——

Mr. McKevitt: Louder, please, we can't hear you.

(Testimony of R. J. McCartney.)

A. We ordinarily do have, but at that time I'm quite sure we didn't have.

Q. (By Mr. MacGillivray): Are you positive of that? A. I'm quite sure.

Q. Are you positive of it?

A. No, not absolutely positive.

Q. The usual custom during the busy summer months is to have a car or cars of salt available in those Yardley yards, is it not?

A. Well, no, it isn't.

Q. During the busy summer months?

A. We try to, but we don't make it sometimes.

Q. Well, isn't that ordinarily the situation during those summer months?

A. Yes, it is, ordinarily.

Q. Yes. And those cars of salt or that car of salt is available in the yard, might be spotted any place in the yard in the vicinity of the salt house?

A. I don't understand?

Q. Well, you spot a car or cars of salt during the summer months maybe on Track 1 or 2, or 8 or 14? A. Store it.

Q. Different places?

A. Yes, might store it.

Q. And you try to spot them in the near vicinity of the icing dock?

A. Have to spot them exactly so you can put a board from the car to the window to unload them.

Q. I mean before they are actually being unloaded, you have them available in the yards, you spot them on some track nearby the icing dock?

(Testimony of R. J. McCartney.)

A. Not necessarily, they can be anywhere.

Q. Not necessarily, I see. And it is a fact, is it not, that sometimes you will unload a car of salt in one day and sometimes it might take two days or even three days?

A. Oh, no. [874]

Q. In and out?

A. Oh, no.

Q. Do you mean you always unload a car of salt at one sitting or one spotting?

A. We have had very rare occasions when we have unloaded a car of salt in two spottings. Ordinarily, it is done in one spotting.

Q. Well, it does happen?

A. It has happened once in a great while.

Q. Yes. You don't know, do you, with any degree of certainty how many cars of salt were available spotted some place in the Yardley yards on July 17, 1952?

A. There were none. That record, you can look at that record, and you will find that there were none. That record is complete.

Q. You mean that this record indicates positively that there was no car of salt in there on July 17, 1952?

A. Yes, sir.

Q. Well, did you not know that several fruit trains were due in and came in to the Yardley yards on July 17, 1952?

A. Well, there would be maybe two, I wouldn't know.

Q. Well, do you know that there were at least two?

A. I don't know.

Q. And when we speak of a fruit train, that is

(Testimony of R. J. McCartney.)

a train [875] composed solely of refrigerator cars, is it not? A. No.

Q. Oh, it isn't?

A. No, it can have double, single, everything else on it. All a fruit train has to have is 10 cars of fruit.

Q. Well, you know that there was a fruit train in there at 4 o'clock on July 17th composed of some 56 reefer cars?

A. There may have been, I wouldn't know.

Q. Well, do you know that on that same date, later in the evening, another fruit train came in to the Yardley yards? A. It could be.

Q. Well, do you know that?

A. No, I don't, I didn't look up any records.

Q. Well, then, assuming, Mr. McCartney, that a fruit train was iced between 4 o'clock and 6:10 on July 17th, and after the icing of that fruit train a supply of salt was then needed at the icing dock, a salt car would be shot in?

Mr. Cashatt: I object to that, your Honor. It is assuming facts that aren't in evidence at all. There is no showing that there wasn't salt in the salt houses.

The Court: Well, he may answer the question.

A. No, no, we had no salt that day to put in.

Q. (By Mr. MacGillivray): I see. [876]
According to the record.

Mr. MacGillivray: That is all.

Mr. Cashatt: That is all, Mr. McCartney.

(Witness excused.)

Is Mr. Maine here? I would like to call Mr. Maine.

ALLAN MAINE

having previously been sworn, resumed the stand on behalf of the defendant and testified further as follows:

Direct Examination

Q. (By Mr. Cashatt): Mr. Maine, what kind of cars were the two cars under which or between which you were passing the bucket under the couplings?

A. Have no idea what the cars were.

The Court: If you will try to speak up a little louder.

A. Have no idea of what kind of cars they were.

The Court: All right, go ahead.

Q. (By Mr. Cashatt): Well, now, you say that you were going between those cars at a point about 10 feet west of the door that you were coming out of, is that right?

A. Approximately that.

Q. The car to the east of where you were going through [877] there, what kind of a car was that?

A. I wouldn't remember, I don't know what kind of car it was.

Q. Was the car immediately to the east, was that a boxcar?

Mr. MacGillivray: Objected to, repetitious. The boy has said twice he didn't know, has no idea of what either one of the cars was.

The Court: He may answer, if he can.

A. I wouldn't know.

The Court: You don't remember what it was?

(Testimony of Allan Maine.)

A. No.

Q. (By Mr. Cashatt): Well, Mr. Maine, was the car that was immediately to the east where you were going between the two cars, was the car that you say they were unloading salt out of?

A. Directly to the east?

Q. Yes, sir? A. No.

Q. How many cars to the east was it that they were unloading salt? A. I wouldn't know.

Q. But it wasn't the car immediately to the east of where you were going between the couplings?

A. No.

Mr. Cashatt: That is all. [878]

The Court: Any cross examination?

Mr. MacGillivray: No, that is all.

The Court: That is all, then.

(Witness excused.)

Mr. Cashatt: Your Honor, I would like to call Mr. Stintzi as an adverse party, and I have just a couple of questions, if it will be all right, I will ask them right here.

The Court: Well, I think he may come up here. It would be easier for the reporter.

GERALD STINTZI

called as an adverse witness by the defendant, having previously been sworn, testified further as follows:

Direct Examination

Q. (By Mr. Cashatt): Mr. Stintzi, what kind of cars were the two that you were going between?

(Testimony of Gerald Stintzi.)

A. I did not notice.

Q. Was the car immediately to the east of the one or the two that you were going in between, was that the car from which you say they were unloading salt? A. No.

Q. How many cars to the east was it where they were unloading salt? [879]

A. I would have to approximate.

Q. Can you do that? A. Yes.

Q. How many?

A. Between two and three cars.

Mr. Cashatt: That is all.

The Court: Any questions?

Mr. MacGillivray: No, your Honor.

Mr. Etter: No questions.

(Witness excused.)

Mr. Cashatt: Will you stipulate, counsel, on this exhibit?

The Clerk: Defendant's 43 for identification.

Mr. Cashatt: May it be stipulated, Mr. MacGillivray and Mr. Etter, that Defendant's Exhibit No. 43 may be admitted in evidence?

Mr. Etter: So stipulated.

Mr. MacGillivray: Yes, sir.

Mr. Cashatt: Which is a map drawn at a scale of one inch equals five feet, showing a portion of the icing dock, the salt house, the tunnel shed, Track 13 and Track 12.

Mr. Etter: Mr. Cashatt. it is agreed, too, isn't it—I should have mentioned this before—that the

icing platform or the dock as it is shown in this exhibit—which is what number? [880]

The Clerk: 43.

Mr. Etter: —43, and the exhibit back here—

The Clerk: That is No. 1.

Mr. Etter: —which is No. 1, that that dock is not in any sense truly representative of the length of that dock?

Mr. Cashatt: That is correct, Mr. Etter, it is a portion of it.

The Court: This No. 43 will be admitted, then. This shows, really, a portion of No. 1 in larger scale?

Mr. Cashatt: That is correct, your Honor, a portion of No. 1 in a larger scale.

(Whereupon, the said map was admitted in evidence as Defendant's Exhibit No. 43.)

Mr. Cashatt: Mr. Crump, please. [881]

JAMES CRUMP

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name, please?

A. James Crump.

Q. Where do you reside?

A. 9525 East Mission in Opportunity.

Q. How long have you lived in the Spokane area?

A. 39 years.

Q. Married? A. Yes.

Q. Family? A. Yes.

(Testimony of James Crump.)

Q. What is your occupation?

A. Railway yardmaster.

Q. And for what railway?

A. Northern Pacific.

Q. How long have you worked for Northern Pacific? A. August 25, 1937.

Q. And since 1937, what jobs have you handled for the company?

A. From 1937 to 1943, I acted as switchman; sometime in 1943 to the present time, I have been used as a [882] yardmaster.

Q. And during your period of service with the Northern Pacific, how much of that time has been spent at Yardley, Washington?

A. Oh, nine-tenths of it.

Q. And since 1943, you have been a yardmaster or assistant yardmaster, have you?

A. That's right.

Q. And, Mr. Crump, you are familiar, are you, with the Northern Pacific yards at Parkwater?

A. Yes.

Q. Can you tell us, Mr. Crump, if that is what is known as a saucer yard?

A. That's right.

Q. And explain, will you please, what a saucer yard is?

A. A saucer yard is shaped just like the word implies, it is shaped like a saucer. The purpose of that is to allow cars, when they are cut off from the engine, to roll down towards the center of the track. In other words, the center of the yard is the lowest

(Testimony of James Crump.)

portion of this yard. That way it speeds up switching operations. Each and every separate track doesn't have to be shoved with the power of the engine; all we have to do is cut the cars off and gravity takes care of the movement of the cars.

Q. And where is the approximate center of the yard, can you tell us, in relation to anything we have talked about here, the ice dock or tunnel or anything like that?

A. Well, just offhand I would say the center would be about where that tunnel is that someone spoke of from Addison Miller's plant to the ice dock. That is about the center of the yard.

Q. Well, now, going east from Switch 13, is there any down grade on Track 13? A. No.

Q. Can you tell us anything further about Track 13 between Switch 13 and say the Addison Miller dock?

A. Well, it is not descending like the rest of our track. In other words, our yard there tends to be more level. I would say that that track is almost level. If anything, it is descending to the west instead of the east.

Q. Now in your switching operations out there, Mr. Crump, what can you tell us about the custom or the procedure of making up trains, locating different cars, and so on, in relation to when they are uncoupled from an engine and let drift down the track?

A. Well, it is the general practice since I have worked there to speed up the engine in order to

(Testimony of James Crump.)

give the cars [884] enough momentum to carry themselves to the approximate destination where the foreman plans them, and the cars are disengaged from this engine after the speed is gathered up, and they, being free-wheeling, roll down to this track that they are designated for. If we shoved all these cars, why you can easily see that it would be a great amount of time consumed in that movement. This way it speeds up the operations.

Q. And for the practical operation of the yards, is it necessary to switch in that manner?

A. You mean by cutting the cars off?

Q. Yes, sir? A. Yes.

Q. Mr. Crump, prior to July 17, 1952, had you been acting as an assistant yardmaster on any particular shift at Yardley, oh, say, for six months before that date? A. Oh, yes.

Q. And on what shift?

A. Second shift.

Q. And what is the second shift?

A. Well, the hours are normally from 3 to 11 o'clock.

Q. And in your job as yardmaster, assistant yardmaster, were you familiar with the custom and the use of the blue light by Addison Miller on Tracks 12 and 13? A. Yes. [885]

Q. Will you tell us what your understanding of that custom was?

A. Well, we have always been on the alert to watch for the blue light on Tracks 12 or 13, and that blue light signifies that there are men working

(Testimony of James Crump.)

on or about cars, and whenever we saw that blue light turned on, we saw to it that there was no engines allowed on that track where they would couple onto the cars where these men might be working.

Q. Whose duty was it to turn the lights on?

A. Well——

Q. The blue lights?

A. The blue lights? That would be someone from the ice dock, that is up to Addison Miller to do that.

Q. And was there any understanding as to how long before they started any work on or about cars they would turn those lights on, blue lights?

A. Well, I don't know of any definite understanding. It was just kind of an unwritten rule that they would give us about five minutes notice. They always seemed to turn them on ahead of the time that they put their men out on top of the cars or whatever they were doing, give us time to get our engines off of there and what not.

Q. And tell us, Mr. Crump, about the loud-speaker system in [886] the yards.

A. Well, the loudspeaker system is for use of the yardmaster to contact the switch foreman or employees on both ends of the yard. Toward the center of the yard, we have one that is used to inform the employees as they go down toward the middle of a train of any change that might have taken place in their original instructions. That saves us going back and doing our work over again.

(Testimony of James Crump.)

We try to contact our employees by the use of the speaker system to make it understood that there is changes to be made, and that saves us time.

Q. During your experience in your work at the Yardley location, have you ever used the loud-speaker system to warn Addison Miller employees or anyone around the Addison Miller dock of any movement of cars in the yard? A. No.

Q. Are you familiar with the microphones—I don't mean microphones, I mean the speakers—that are located on a post between Switch 13 and the Addison Miller dock? Are you familiar with those?

A. Yes, I have used them.

Q. In what direction are those speakers set?

A. Well, they are placed—there is two horns at the top of this pole and one is facing north, one facing south, [887] so as to broadcast over the top of the yard where our switch foremen and our switchmen can pick our voices.

Q. Mr. Crump, prior to July 17, 1952, were you familiar with the phone arrangement between the yard office and the Addison Miller dock?

A. Yes.

Q. Was it customary for Addison Miller to use that phone and call you when they intended to have men working on or about the dock?

A. Yes, they either notified the yardmaster on duty or the ice foreman before they did anything down there.

Q. And in the yard office, Mr. Crump, does the ice foreman work under your jurisdiction?

(Testimony of James Crump.)

A. That's right.

Q. And you have access to his information and his work as it is carried on? A. Oh, yes.

Q. Does he keep in close touch with you throughout the shift as to anything occurring at the Addison Miller dock? A. Yes.

Q. Now I believe, Mr. Crump, you said that about nine-tenths of your entire service with the Northern Pacific has been spent at Yardley?

A. That's right. [888]

Q. In that period of time, Mr. Crump, did you have an opportunity of being close to or around the Addison Miller dock? A. Many times.

Q. Did you ever see anyone or any employee of the Addison Miller Company crawling under couplers of any stationary cars located on Track 13?

A. No.

Q. Did you ever see any Addison Miller employees carrying slush ice in buckets across Track 13? A. No.

Q. Prior to and up to and including July 17, 1952, what did you know about any slush ice operation at the Addison Miller dock?

A. Well, I had seen the slush ice in my trips to the ice dock. I had always assumed that the melting process—

Mr. MacGillivray: Just a minute, I object to what he might have assumed.

The Court: Yes, I think you should state it without your assumptions or conclusions.

Q. (By Mr. Cashatt): Well, when you saw the

(Testimony of James Crump.)

slush ice there, Mr. Crump, did you see it melting in the location where it was? A. Yes.

Q. Did you prior to July 17, 1952, know that they had ever [889] carried any slush ice outside of the building? A. No, I didn't.

Q. Did it ever come to your attention, through your own personal observations or through your employees under you, that Addison Miller employees ever crossed Track No. 13 for any purpose?

A. No.

Q. Now, Mr. Crump, at times when you have been in the yards at night, have you observed the white lights? A. Yes.

Q. Being illuminated on the Addison Miller dock? A. Yes.

Q. Just tell us in your own words what that indicated to you, if anything?

A. Well, that there was men waiting for cars to be spotted, or they were preparing their work ahead by hauling salt and ice, that is, placing it on the dock in preparation for the cars to be spotted.

Q. Now on July 17, 1952, what time did you come to work, Mr. Crump? A. 3 p.m.

Q. And when you arrived at the yard office at 3 p.m., did you look—or were you given Plaintiff's Exhibit No. 40? A. Yes. [890]

Q. And what is Plaintiff's Exhibit No. 40?

A. Well, that is a page from what is known as our turnover book. It gives the yardmaster coming on duty a picture on paper of what the yard looks

(Testimony of James Crump.)

like as to makeup of trains, storage of cars, clear tracks, and so on.

Q. And was that left for you by the assistant yardmaster who was just going off shift?

A. Yes.

Q. And was that Mr. Miller? A. Yes.

Q. Mr. Crump, referring to Track 13, is there a notation on Exhibit 40 concerning Track 13?

A. It says "Icers for 661 & City."

Q. Then after you got on shift, what did you do, if anything, about the cars that were on Track 13, the icers for 661 and city?

A. Well, shortly after the switching crews went to work, I directed one of the crews to remove these cars from Track 13 and place them on the respective tracks.

Q. Showing you Defendant's Exhibit No. 38, do you recognize what that is, Mr. Crump?

A. Yes, this is the form that is kept up to date by the ice foreman.

Q. Are the icers for 661 and the city shown on Exhibit No. 38? [891]

A. On this one here?

Q. Yes? A. Well, they probably are.

Q. This is starting at 3:45, I think, is the first time notation.

A. Oh, yes, there is one here, "Stop Lewiston."

Q. Two cars shown there, Mr. Crump?

A. I see only the one, Lewiston.

Q. Lewiston? A. Uh-huh.

(Testimony of James Crump.)

Q. Then did you give the orders to take those cars off of Track 13? A. Yes.

Q. And at the time you removed those cars, did you give orders to put any salt car or any other car on the track before the fruit train arrived?

A. No.

Q. And did a fruit train arrive that afternoon?

A. Yes.

Q. And is that Train No. 5112?

A. That's right.

Q. About what time did that train arrive?

A. Oh, about 4 o'clock.

Q. And when it arrived in the yard, did you have anything to do with the locating of that train on any tracks? [892]

A. Yes, I direct the train crews coming in where to place their train.

Q. And did you direct the train crew on Engine 5112 where to place that train?

A. Yes, on No. 12.

Q. And after they placed it on No. 12, did you have the train divided or did you do anything like that with it?

A. Yes, I directed the east end switch crew to take off what cars were east of the ice dock on No. 12 and place them on Track 13 so they could ice on both sides of the dock.

Q. The evidence here is that there were 55 cars in that train. Is that about to your recollection?

A. That is about right, yes.

(Testimony of James Crump.)

Q. Then about what time, Mr. Crump, was that icing operation on that fruit train completed?

A. Oh, around 6 o'clock, I guess.

Q. How did you know or how were you advised that the operation was complete?

A. By the man in charge from Addison Miller notified the ice foreman and he, in turn, notified me that they are completed with their work.

Q. And were you so notified on the evening of July 17, 1952, shortly after 6 o'clock?

A. Yes. [893]

Q. And after receiving that notification, what orders did you give, if any, concerning the movement of that fruit train?

A. I directed the switch crew on the east end of the yard to pick up the cars off of No. 13, which they had placed there, put them back on the train so that we could complete the makeup of the train.

Q. And did the switch crew carry out those orders? A. They did.

Q. What time did the train leave the yards?

A. Oh, it was around 7 o'clock.

Q. Now at that time, when you ordered the switch crew to take the cars off of Track 13, when that operation was completed, was the Track 13 clear? A. Yes.

Q. Of all cars?

A. Of all cars, yes.

Q. Following that, Mr. Crump, what were the next orders you gave for the placement of any cars of any kind on Track 13?

(Testimony of James Crump.)

A. Well, sometime after the departure of the fruit train, Foreman Sheppard came down to the yard office with some cattle cars and wanted to know where to place them, so I instructed him—I went outside and told him to put them on Track 13, which is normally our East storage [894] track.

Q. Where had those cars come from, do you know?

A. Well, they had accumulated at Armours. I assume they were Armours' or stock tracks, anyway.

Q. That man you mentioned, Sheppard, is he on that run of Armours?

A. Yes, that is his job.

Q. Carstens. And you say you instructed him to place those on Track 13?

A. Yes.

Q. And were you outside of the yard office when you gave that instruction?

A. I was.

Q. Did you see the cattle cars, the stock cars, as Switchman Sheppard was placing them on Track 13?

A. Yes.

Q. How many cattle cars were there in that group?

A. Nine, I believe.

Q. And what procedure was used in putting those cars on Track 13?

A. After I gave him his instructions, he climbed aboard the end car, in other words, the east car, and they started shoving down our working lead toward No. 13 Switch. He stopped the movement, got off, threw the switch, and then as the engine backed

(Testimony of James Crump.)

up, the cars were [895] uncoupled from the engine and they drifted slowly into Track 13, which was clear.

Q. Were there any cars on Track 13 at the time these 9 empty stock cars were switched onto the track? A. No.

Q. When you were outside the yard office, did you look down Track 13? A. Yes.

Q. What did you see?

A. Well, it was clear prior to that time.

Q. And then were the 9 stock cars placed on Track 13? A. Yes.

Q. Now what were you using Track 13 for on that particular night right at the time that you gave the orders to put the 9 stock cars on the track?

A. Normally, that track is used for an accumulation of eastbound freight business, and so we use that where we store our eastbound cars.

Q. And were you putting these 9 empty stock cars onto the track to make up a train which would later go East?

A. Yes, they were destined to go East, uh-huh.

Q. And do you know what kind of stock cars those were?

A. They were foreign, I believe they were C. B. & Q.

Q. And empty? A. Oh, yes. [896]

Q. Was there anything, merchandise of any type or kind, in those stock cars as they passed by you and went onto Track 13? A. No.

(Testimony of James Crump.)

Q. About what time, as nearly as you can say, were these 9 stock cars placed on Track 13?

A. Oh, I suppose it was around 7 o'clock.

Q. After the fruit train had pulled out, is that right?

A. Yes.

Q. And do you recall giving Foreman Prophet an order for the picking up of 14 cars on Track 43 with instructions to place them also on Track 13?

A. Yes.

Q. At the time you gave that instruction, Mr. Crump, had any other cars of any kind been placed on Track 13 after these 9 stock cars you mentioned went down there?

A. No.

Q. At the time you gave Mr. Prophet the instruction that you have just mentioned, did you know of your own personal knowledge all of the cars that were on Track 13?

A. Yes. I have to.

Q. And that is part of your job, is that right?

A. That's right.

Q. Now did you see the switching operation, did you personally observe the switching operation that Prophet [897] carried out to put the 14 cars on Track 13?

A. Yes.

Q. Where were you located at that time?

A. Well, just outside of the yard office.

Q. At that time, Mr. Crump, tell us what the condition of lightness or darkness was.

A. Well, it was still light, the boys weren't using their lanterns yet, so I could see down Track 13, it was clear.

(Testimony of James Crump.)

Q. You could see down Track 13, could you, sir?

A. Yes.

Q. And did you stay at that location and keep your eye on the switching movement as it was being made?

A. I did, yes.

Q. Did you also keep a lookout down Track 13 at the Addison Miller dock?

A. Yes.

Q. Did you see any blue light on Track 13 at any time when this switching operation was being carried out?

A. No.

Q. I think, Mr. Crump, I should have said did you see any blue light on the Addison Miller dock on Track 13 at any time that switching operation was being carried out?

A. No. [898]

Q. And how long did you follow those cars?

A. Well, until they were well into No. 13. They were rolling so slowly I was dubious whether I should let these boys go to lunch or not for fear the cars wouldn't roll in far enough to clear our working lead. So I stood there and watched them roll down there very slowly until they were in the clear of our working lead on Track 13.

Q. And at that time, would they be well down Track 13 toward the Addison Miller dock, when you last saw them?

A. Yes.

Q. Now at any time, Mr. Crump, between the time you came on shift at 3 o'clock in the afternoon of July 17, 1952, and the time you went off shift at 11 o'clock on that day, was any salt car ever placed on Track 13?

A. No.

Q. If any salt car had been placed on Track 13,

(Testimony of James Crump.)

under whose direction would it have to have been done? A. Only under my direction.

Q. Could anybody else in the yards have placed a salt car on Track 13 without your direction or without your order? A. No.

Q. Or without your knowledge?

A. No, not without my knowledge. [899]

Q. When you are acting as the assistant yard-master on a shift out there, do you have full and complete charge of all switching crews that are working in the yard? A. That's right.

Q. Are they all directly under your supervision? A. Directly under.

The Court: It will take some time to conclude with this witness?

Mr. Cashatt: I presume it will, your Honor.

The Court: Recess?

Mr. Cashatt: That will be fine.

The Court: We will recess for 10 minutes.

(Whereupon, a short recess was taken.)

The Court: Mr. Crump, you may take the stand again.

The Clerk: Your Honor, I have marked Defendant's 44, 45 and 46 for identification.

The Court: All right.

Q. (By Mr. Cashatt): Mr. Crump, handing you Defendant's Exhibit No. 44 for identification, will you look at that photograph and state whether or not you recognize what is shown there?

A. Yes, I do.

Q. And what you see in the photograph, would

(Testimony of James Crump.)

the conditions you see there, as far as the track and switch, [900] and so on, be the same as it was in July, 1952? A. Yes.

Q. Handing you Defendant's Exhibit No. 45 for identification, do you recognize what is shown there? A. Yes.

Q. And is that a true representation of the way that section of the yard looked in July, 1952?

A. Yes.

Q. Handing you Defendant's Exhibit No. 46 for identification, will you state if you recognize what is shown there? A. Yes, I do.

Q. And the conditions shown there in Exhibit 46 for identification, are they the same as they were in 1952? A. Yes.

Q. July of '52.

Mr. Cashatt: Offering Defendant's Exhibits 44, 45 and 46.

Mr. MacGillivray: May I inquire, Mr. Cashatt, are these all of the pictures?

The Court: Let's see, what are those numbers?

Mr. Cashatt: 44, 45 and 46, your Honor.

Mr. MacGillivray: May I inquire if these are all of the pictures taken on behalf of the defendant on whatever date these were taken? [901]

Mr. Cashatt: 45 and 46, Mr. MacGillivray, are all that were taken on that particular day. 46 is the only black and white picture. The others I showed you were colored film that required a viewing box to see.

Mr. MacGillivray: Was there not, Mr. Cashatt,

(Testimony of James Crump.)

a picture or pictures taken of two railroad cars showing the coupling between them?

Mr. Cashatt: Those, Mr. MacGillivray, were taken on an earlier date.

Mr. MacGillivray: Do you have them?

Mr. Cashatt: I don't have them, I will be glad to furnish them.

Mr. MacGillivray: Will you furnish them when we return after lunch?

Mr. Cashatt: I will.

Mr. MacGillivray: I have no objection to 44, no objection to 45. I might inquire as to 46.

The Court: All right.

Voir Dire Examination

Q. (By Mr. MacGillivray): Exhibit No. 46 was taken at what time of night?

A. I really couldn't say when it was taken.

Q. Well, don't you know that that picture was taken at 8:20 p.m. on July 17, 1953?

A. No, I don't. [902]

Q. In that picture is shown the icing dock?

A. No.

Q. Is not shown in the picture?

A. There is a silhouette of it, yes.

Q. And are there any lights shown on the icing dock in that picture? A. Yes.

Q. White lights? A. Yes.

Mr. MacGillivray: Mr. Cashatt, may be stipulate, without bringing another witness, that this picture was taken at 8:20 p.m. on July 17, 1953?

(Testimony of James Crump.)

Mr. Cashatt: That is correct.

Mr. MacGillivray: No objection.

The Court: They will be admitted, then.

(Whereupon, the said photographs were admitted in evidence as Defendant's Exhibits Nos. 44, 45 and 46.)

Q. (By Mr. Cashatt): Mr. Crump, Exhibit No. 44, will you just step over here and tell the jury what that shows?

A. This is looking east toward our switching yard from just a little west of No. 13 Switch. This gentleman [903] (indicating) is standing at No. 13 Switch. As I say, looking east from that direction.

Q. And can you point out, Mr. Crump, if the Addison Miller dock is shown in Exhibit 44?

A. Yes, this here (indicating) is the Addison Miller dock.

Q. And the track, can you point out Track 13 if it is shown there?

A. That is Track 13 leading along there (indicating).

Q. And Exhibit 45, what is shown there, Mr. Crump?

A. This is a close-up picture of the area right just west of the Addison Miller dock. This is the beginning of the Addison Miller dock right here; this is No. 13 (indicating).

Q. Mr. Crump, you haven't seen this before, that is Exhibit 16, Plaintiff's Exhibit 16. Do you recognize what that shows? A. Yes.

Q. And now in Exhibit No. 45, will you point

(Testimony of James Crump.)

out where that particular building would be located, the general location as it is in 45?

A. This building, this sloping part is the same sloping part you see here (indicating). In other words, this building is just east of this light roof part of the building.

Mr. McKevitt: Have him identify the two exhibits [904] as you refer to them.

Q. (By Mr. Cashatt): The last that you told us about was off of Exhibit No. 45, Defendant's Exhibit 45? A. That's right.

Q. And will you point out again on Defendant's Exhibit No. 45 the sloping area that you pointed out in Exhibit No. 16?

A. This light area (indicating), the way the sunlight is directed against it, is the same slope that you see on this exhibit here.

Q. And when you said "this exhibit here," you meant Exhibit 16? A. That's right.

Q. Is the Addison Miller dock shown in Exhibit No. 46, the outline of the dock?

A. The outline, the silhouette, yes.

Q. And on the west end I see two lights. Do you recognize what those lights would be?

A. Well, those would be the lights illuminating the dock.

Q. The small lights right on Track 12 and Track 13 shown there, what would those be?

A. Well, that would be the blue lights.

Q. And this is, of course, a black and white picture, isn't it? A. Yes. [905]

(Testimony of James Crump.)

Q. And they don't show in color on this picture?

A. No.

Q. Now Exhibit No. 46, can you tell us from looking at Exhibit 46 from where it was taken?

A. At approximately the same spot you saw in this daylight picture of the gentleman standing by No. 13 Switch.

Q. Approximately the same location as Exhibit No. 44?

A. That's right, looking the same direction.

Q. Looking east? A. That's right.

Q. Now, Mr. Crump, on July 17, 1952, if the blue lights had been on the Addison Miller dock at the time the 14 cars were switched in, you believe that that would appear as it does in Exhibit 46?

A. Yes, it would be visible.

Q. If they were on? A. That's right.

Q. You may sit down again.

Now, Mr. Crump, from the location you were on July 17, 1952, when the 14 cars were proceeding down Track 13, if the blue light had been on at the Addison Miller dock, could you have seen it from that location? A. Very plainly, yes.

Q. Do you know, Mr. Crump, how many cars of salt the salt pit at the Addison Miller dock holds at one time? [906]

A. I believe four carloads.

Mr. Cashatt: You may inquire.

Cross Examination

Q. (By Mr. MacGillivray): Mr. Crump, you

(Testimony of James Crump.)

have been employed by the Yardley yards since 1937? A. That's right.

Q. About 90 per cent of the time?

A. Yes.

Q. And as I understand, that yard is what you refer to as a saucer yard?

A. That is correct.

Q. In other words, the yard from east and west slopes toward the center?

A. Uh-huh, that's right.

Q. And the center of the yard is approximately at the tunnel leading from the ice plant to the icing dock itself? A. Approximately, yes.

Q. And then did I understand you to say that although the center is at that point, that Track 13 from 13 Switch running east to the center of the yard runs uphill?

A. I said it would tend to run uphill more than the other direction. [907]

Q. I don't quite follow you, Mr. Crump. The center of the yard, the center of the saucer, is at the dock?

A. I am assuming that, yes.

Q. And it slopes down to that center?

A. Uh-huh.

Q. Well, doesn't that mean that Track 13 slopes to the center of that saucer?

A. I testified previously that No. 13 track is where our yard tends to level off. In other words, from 13 on over, it is not used as a saucer portion

(Testimony of James Crump.)

of our yard, and it was more apt to be level than anything.

Q. Well, in other yards, there is a break at 13 Switch and from 13 Switch on east to the center of the yard it is level, is that it?

A. State that again, please.

Q. There is a break in the downhill slope at 13 Switch and from that point east to the icing dock it runs level? A. Fairly level, yes.

Q. Then you spoke of this loudspeaker system, Mr. Crump, stating that you had loudspeakers in the center of the yard approximately just west of the Addison Miller dock? A. That's right.

Q. Did I understand that the speakers at that point face north and south? [908]

A. I believe that when I observed them when they were first installed, I helped the man, that is, helped with the use of my voice, testing them out, I believe they were facing north and south. I can't say for sure.

Q. When you tested them out, you can hear those loudspeakers all over the Yardley yards, can't you? A. No.

Q. Well, you can hear those loudspeakers at least 500 feet away without difficulty, can't you?

A. Without too much noise of exhaust of engines, bumping of cars, what not, normally.

Q. At least 500 feet? A. Yes.

Q. Now handing you Exhibit No. 15, aren't the speakers to which you refer in the center of the yard near the ice dock facing east and west?

(Testimony of James Crump.)

A. They are.

Q. And that is the condition as it existed on July 17, 1952, is it not?

A. Yes, apparently.

Q. And those loudspeakers are approximately 100 feet west of the icing dock, is that not true?

A. At least that much.

Q. How far would you say?

A. I would say more, 250 feet. [909]

Q. 250 feet? A. That's right.

Q. Well, at least, they are close enough to the icing dock that anyone on the icing dock would have no difficulty hearing any warning cast over the loudspeaker system?

A. If it were still, if there was no switching movements going on in that direct vicinity, why it is possible that they could hear my voice.

Q. Well, on July 17, 1952 immediately prior to turning these 14 cars loose up at the yardmaster's office, there was no switching going on on Track 13 or Track 12, was there?

A. Not to my knowledge.

Q. Then I understand that the loudspeaker system is used only to convey messages to employees of the Northern Pacific and no one else?

A. That's right.

Q. It would not be correct that for 8 years prior to July 17, 1952, that loudspeaker system had been used to advise of the movement of cars so far as anybody was concerned?

A. It wouldn't be correct to say that, no.

(Testimony of James Crump.)

Q. I see. Then you made the statement that you are always alert for the blue flag or blue light at the Addison Miller dock? [910]

A. That's right.

Q. Now you have blue lights and blue flags, do you not? A. Yes.

Q. The blue flags are used in the daytime and the blue lights are used at night? A. Yes.

Q. And the reason for that is that during the daytime you can't see a blue light?

A. That's right.

Q. You made the statement, Mr. Crump, that at the time you turned the 14 cars loose from Old Main in front of the yard office onto the lead down onto Track 13 on July 17, 1952, it was still daylight?

A. Dusk, it was getting dark. The light would be at my back if I were looking toward the ice dock at 13.

Q. Well, you made the statement it was still daylight, is that a correct statement?

A. Well, I am only distinguishing between daylight and dark. It was tending to get toward dark.

Q. Well, if it was daylight, you couldn't see any blue light, could you?

A. With the light at my back, yes.

Q. You could?

A. I couldn't see it in the morning facing the sunlight.

Q. I see. Do they use any blue flag down at the Addison [911] Miller dock? A. Yes.

(Testimony of James Crump.)

Q. They do?

A. In daylight hours. That is what you just said.

Q. Is there a blue flag present on the west end or any blue flag at either side on the west end of the Addison Miller dock?

A. I couldn't say.

Q. Well, don't you know that there is not and never has been?

A. The blue flag rule says that a blue flag should be used in the daytime.

Q. Now the question, do you know that there is not, there was not on July 17, 1952, and never has been a blue flag? A. I don't know that.

Q. Present on the Addison Miller dock?

A. I don't know that.

Q. You didn't know that there ever was, either, did you? A. No.

Mr. Cashatt: If your Honor please, I am going to object to this. My understanding is they don't put the blue flag on top, they put it on the track, and I don't think that is a fair question.

The Court: Well, you may bring that out on re-direct [912] examination, if that is the case.

Q. (By Mr. MacGillivray): Then you said, Mr. Crump, that it is customary to phone from the dock to the yard office whenever men are working on and around the icing dock, is that correct?

A. They notify me, yes.

Q. Well, that is a system that has been inaugurated since July 17, 1952, is it not?

(Testimony of James Crump.)

A. No.

Q. That was the system before then?

A. Yes. The phone.

Q. Pardon? A. The phone.

Q. In other words, if that is correct, Mr. Crump, you didn't rely on the blue flag or blue light system, did you? A. Strictly.

Q. Well, what was the purpose of the phone calls, then?

A. To have a complete understanding. In other words, that is the only means they had of notifying us they were about to service cars or had completed their service.

Q. I see. And prior to July 17, '52, did you have a custom of advising the Addison Miller dock from the yard office over the phone system that free cars were being shunted onto and drifted down Tracks 12 and 13? [913] A. No.

Q. Well, to advise from the yard office to the icing dock, either by phone or by the loudspeaker system, that advice could be given in a matter of seconds, couldn't it? A. Yes.

Q. Yes. Then, Mr. Crump, you have been, during this 15 year period prior to 1952, around that icing dock a lot? A. Many times.

Q. And you are familiar with the fact, as is shown on Exhibit No. 12 here, that immediately to the north of Track 13 there was a common dumping ground? A. That's right.

Q. And you were familiar with the fact, Mr. Crump, that for several years prior to '52, when

(Testimony of James Crump.)

they were using paper sacks for salt, that those paper sacks, after having been emptied in the icing operation, were taken over and dumped in that common dumping ground?

A. I didn't know that.

Q. Well, do you mean that you have never seen paper salt sacks in that common dumping ground prior to 1953, July?

A. I cannot say definitely that I have or haven't seen it. The refuse from boxcars being cleaned in that area is [914] normally what you see in this picture.

Q. Don't you see salt sacks in that picture?

A. I didn't look at it closely. I can't see that it designates the salt sacks; it is merely paper here.

Q. Can't you see any salt sacks in that picture?

A. Not distinguishable, no.

Q. I see. Well, Mr. Crump, didn't you know as a fact that you had seen prior to July, 1952 salt sacks that had been dumped in that common dumping ground by Addison Miller employees?

A. I don't remember of ever noticing salt sacks in that area.

Q. And didn't you know and realize that to dump those salt sacks north of Track 13, someone had to carry them across Track 13 to that common dumping ground?

A. As I stated, I didn't know it was the practice of dumping them there.

Q. I see. And, as a matter of fact, over this 15 years of your experience there at the Yardley

(Testimony of James Crump.)

yards, hadn't you often seen slush ice in that common dumping ground north of Track 13?

A. Never to my knowledge.

Q. Never to your knowledge?

A. That's right.

Q. Is it that you don't recall, or are you positive you [915] have never seen that in that 15 years of service?

A. I will say I don't' recall.

Q. You don't recall. Well, if you had seen that, the presence of slush ice in that common dumping ground over this 15 years of your experience prior to 1952, you knew and realized that to get that ice there from the slush pit in the icing dock, someone had to carry it across Track 13 to that dumping ground, did you not?

A. Yes, it would have to be carried by someone.

Q. Yes. And anyone in authority at the Yardley yards, employees of Northern Pacific, would have that same realization, seeing that situation existing, isn't that correct?

A. They would realize it, yes.

Mr. Cashatt: I object to that, your Honor, as to what refers to others there.

The Court: Well, I will overrule the objection. He has answered.

Q. (By Mr. MacGillivray): Then you made the statement, Mr. Crump, that the white lights on the top of the Addison Miller dock when illuminated meant to you that men were working on or around

(Testimony of James Crump.)

that dock in preparation for icers or refrigerators later to be spotted on either Tracks 12 or 13?

A. That's right. [916]

Q. When you spoke of men, you meant men and boys, didn't you?

A. I don't distinguish between the employees by their age.

Q. Well, from your 15 years experience, didn't you know that Addison Miller continuously during the summer months hired and used high school kids out on that icing dock?

A. I was not aware of that.

Q. You were not aware of that? A. No.

Q. Over the whole 15 years?

A. That's right.

Q. Did you pay any attention at all at any time to the employees of the Addison Miller Company, whom they might be and the ages they might be?

A. I was concerned merely with my own work, I didn't take any particular notice.

Q. I see. Then on the evening of July 17, 1952, immediately prior to the time these 14 cars were turned loose and drifted onto Track 13, the white lights on the top of the Addison Miller dock were illuminated, were they not?

A. I don't remember for sure, I couldn't say that statement for sure.

Q. Well, didn't you look? [917]

A. I looked down there to observe the blue lights.

Q. You just can't remember?

(Testimony of James Crump.)

A. I can't remember that there were white lights, no.

Q. Well, if there had been white lights illuminated on the top of that dock when you looked down there before you gave instructions to turn those 14 cars loose, that meant to you that there were men working on and around that icing dock, did it not?

A. Yes.

Q. Now as I understand, Mr. Crump, a fruit train came in at 4 p.m. that afternoon?

A. That's right.

Q. Composed of how many refrigerator cars?

A. 55, I believe it was, or 56.

Q. And those, necessarily, would have to be and were iced both on the north and south sides of the icing dock? A. That's right.

Q. And that icing operation was completed sometime between 6 and 7 p.m.? A. Yes.

Q. And in your 15 years experience, you are familiar with that icing operation? A. Yes.

Q. And what has to be done in preparation for an icing operation? [918] A. Yes.

Q. Now from your records, will you tell us when the next refrigerator cars were due in at the Addison Miller dock the evening of July 17, 1952 after 7 o'clock?

A. I can only go by what has been testified here before. It was about 9 something, I couldn't say.

Q. Well, is this the record, that it will show in this large book?

Mr. Cashatt: You haven't the right date.

(Testimony of James Crump.)

A. No, it would be this record here, I believe (indicating).

Q. (By Mr. MacGillivray): Well, refer to the record and tell us.

A. You want to know when the next car was serviced?

Q. Pardon?

A. You want to know when——

Q. Yes, when the next cars were due in there for icing purposes after 7 p.m. that evening?

A. Well, looks like it is about 11:30 p.m.

Q. 7:30 p.m.? A. 11:30 p.m.

Q. 11:30? A. Uh-huh.

Q. Wasn't there something due in at 9:35?

A. I don't see it here, unless I am overlooking it. I [919] don't see any time of 9:35.

Q. Was that a fruit train due in at 11:30?

A. Oh, no—at 11:30 it was, but not this time you speak of at 9:35.

Q. Well, what was due in at 9:35?

A. That I couldn't say. I imagine it was one load or several loads off of another train, either east or eastbound, not a fruit train.

Q. I see. Well, when would you have received advice in the yardmaster's office that there were some icers coming in at 9:35?

A. If they came in on the S. P. & S. train, I had no notice, but on the N. P. trains—both of them came in the N. P. yards at Yardley—on the N. P. trains, I have approximately an hour and a half's notice.

(Testimony of James Crump.)

Q. Hour and a half's notice?

A. That's right.

Q. When you receive that notice, you convey that information to the icing dock?

A. To the ice foreman.

Q. Yes. A. Uh-huh.

Q. Well, your ice foreman, you mean?

A. He takes care of that part, yes.

Q. In any event, if that information was received an hour [920] and a half before the train comes in, that is conveyed to your ice foreman, he in turn conveys it to the Addison Miller foreman?

A. That's right.

Q. And when did you receive advice that a fruit train was coming in at 11:30?

A. We have an operator on duty at the Yardley yard and he brings in a written notice.

Q. About what time did you receive that advice?

A. The train arrived at 11:30, so I am going to say 10 o'clock. That is pretty close.

Q. This 4 o'clock fruit train was pulled out of Tracks 13 and 12 about 7 o'clock and went on its way?

A. The train departed at a little after 7, yes.

Q. And you, of course, knew that there had been 55 icers iced in that operation completed sometime between 6 and 7? A. That's right.

Q. You knew, also, did you not, Mr. Crump, that the employees of Addison Miller generally went to lunch about 7:30 o'clock on the 3 to 11 shift?

A. No, I didn't know that.

(Testimony of James Crump.)

Q. Well, isn't that the time that you fellows have your lunch on that shift, approximately?

A. No, we go to lunch 4 hours and 30 minutes or after. Any [921] time after 4 hours and 30 minutes after we go to work. We don't have any definite time to go to lunch.

Q. Well, that would be at any time from 7:30 on?

A. For me, you mean?

Q. Yes.

A. It would have been for me if I had found time, yes.

Q. Well, didn't you know that same practice was followed at the Addison Miller dock?

A. No. I don't know, that is a separate company.

Q. Well, you did know that after the fruit train left at 7 p.m., that it was then necessary, whether before lunch or after lunch, for Addison Miller employees to get that icing dock in shape to service icing cars that came in that evening after 7 p.m.?

A. That was their practice, yes.

Q. Well, you knew that, didn't you?

A. Yes.

Q. And so you knew that at 8:20 p.m. when you turned those 14 cars loose up at the yardmaster's office that that work would be in progress at the Addison Miller dock?

A. I didn't know of any specific work going on.

The Court: We will have to suspend this case now until 2:30. We have a naturalization hearing at 1:30 that will last at least an hour, so I will excuse the jury and suspend this case until 2:30 this

(Testimony of James Crump.)

afternoon. Come back at [922] 2:30 this afternoon.

(Whereupon, the trial in the instant cause was recessed until 2:30 o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to recess, all parties being present as before, and the following proceedings were had, to-wit:)

The Clerk: Mr. Crump.

JAMES CRUMP

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. MacGillivray): Mr. Crump, I believe you had just told us that this 4 o'clock fruit train was pulled out of 13 about 7 o'clock at night of July 17th?

A. It departed shortly after 7. [923]

Q. And you have also told us that from your 15 years experience at the yard and with the icing operation, you knew that shortly after 7 p.m. the employees at the icing dock would start to prepare that dock for the arrival of the next fruit cars or fruit train of reefers?

A. Apparently they did. I didn't know of any specific time that they would start making preparations.

Q. Well, you knew, did you not, Mr. Crump, after 7 o'clock that night, this 56-car reefer train

(Testimony of James Crump.)

having pulled out, that within a reasonable period of time after that, the icing employees on the dock would start to prepare that dock for the 9:35 or the 11:35 train that came in? A. Yes.

Q. And you knew that fact, Mr. Crump, at 8:20 and 8:15 p.m. that evening? A. Yes.

Q. And you knew that fact when you turned these 14 cars loose on the Old Main in front of the yard office drifting toward Track 13?

A. Yes.

Q. And these records that you have—I forget the exhibit number—that you keep as to cars in the yard at any given period of time, those are kept by the assistant yardmaster on duty? [924]

A. That's right.

Q. All those records show, Mr. Crump, is what cars might be in the yard and their approximate locations at 7 o'clock in the morning, at 3 o'clock in the afternoon, and at 11 o'clock at night?

A. Yes.

Q. You do not keep any records as to the movements of cars and the location of cars between those respective times?

A. Only a mental record, which a yardmaster has to have complete knowledge of the capacity of a track and approximately how many cars are on that track, what position on the track they are standing, whether it be in the middle, west, or the east end.

Q. Do you have a record kept in the yard-

(Testimony of James Crump.)

master's office as to what cars were on Track 13 at 8:15 p.m., July 17, 1952?

A. Do we have a record, you say?

Q. Yes? A. Not that I know of, no.

Q. So that when you say there was no salt car on Track 13 at 8:15 p.m. on July 17, 1952, you are depending on your recollection of two years ago?

A. Yes, I am depending on my knowledge as yardmaster by looking down and ascertaining that the track was clear [925] when that movement was made.

Q. Then, Mr. Crump, regardless of the presence of a salt car on Track 13 at 8:15 p.m. that evening, you knew, did you not, that in preparing the icing dock for cars, that is, reefer cars that would come in later that evening, that in the ordinary course of events, salt would be taken from the salt pit up on to the dock in the elevator? A. Yes.

Q. And you were thoroughly familiar with just where that salt pit was located with reference to Track 13 and how that operation was conducted?

A. Yes.

Q. At 8:15 p.m. on July 17, 1952, immediately before you turned those 14 cars loose, did you take into consideration that men and boys, maybe five, six or seven in number, would be working in that open doorway and at the salt elevator within the space of two or three feet of any cars that might then be spotted on Track 13?

A. I knew that in order to bring salt up to the

(Testimony of James Crump.)

dock, that it would have to be loaded on through the doorway, yes.

Q. Did you take that fact into consideration before you ordered those 14 cars turned loose onto Track 13?

A. This track being a trainyard track—— [926]

Q. Did you take that into consideration?

A. I don't know as it is necessary to consider.

Q. The question is, Mr. Crump, did you take it into consideration or did you not?

A. I will say I didn't.

Q. You didn't? A. I didn't.

Q. Mr. Crump, you spoke about blue lights. You have a blue light rule in the operating rules?

A. That's right.

Q. And are you familiar with the operating rule book? A. Yes.

Q. Are you familiar with Rule 805?

A. Not by number.

Q. By contents? A. Beg pardon?

Q. Are you familiar with it by its contents?

A. Yes.

The Court: A copy may be substituted.

Q. (By Mr. MacGillivray): Mr. Crump, were you familiar with that section of Rule 805 of the Consolidated Code reading as follows: "Before moving cars"——

Mr. McKevitt: Your Honor, for the purpose of the record, the defendant objects to the introduction of that [927] rule or any portion thereof into this case as not being within the issues. It has

(Testimony of James Crump.)

not been pleaded and it is not contended or asserted that we violated any rule that was enacted for the benefit of Addison Miller employees.

The Court: All right, the record will show the objection. Overruled.

Q. (By Mr. MacGillivray): Mr. Crump, were you on July 17, 1952 at 8:15 p.m., immediately before you turned these 14 cars loose in front of the yard office, familiar with that section of Rule 805 of the Consolidated Code reading as follows: "Before moving cars or engines in a street or a station or yard track, it must be known that they can be moved with safety." A. Yes.

Q. And were you familiar with this section of Rule 805: "Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone."

A. Yes.

Mr. MacGillivray: Ask, your Honor, the admission of the quoted sections of Rule 805 of the Consolidated Code. A [928] copy of the sections can be substituted for the complete Consolidated Code to be placed in evidence.

Mr. McKevitt: Same objection as we previously stated.

The Court: Yes, the record will show the same objection, and it will be overruled and the exhibit admitted. That is 47, isn't it?

The Clerk: That is 47. Now I have marked Plaintiff's 48, 49 and 50 for identification.

(Testimony of James Crump.)

(Whereupon, the said sections of Rule 805 were admitted in evidence as Plaintiff's Exhibit No. 47.)

DEFENDANT'S EXHIBIT No. 47

The Consolidated Code of Operating Rules
and General Instructions
Edition of 1945

(Excerpt from Sec. 805, page 190)

Before moving cars or engines in a street, or on station or yard tracks, it must be known that they can be moved with safety.

Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone. When cars are moved, they must be returned to their former location unless otherwise provided,

Q. (By Mr. MacGillivray): Mr. Crump, relying on your recollection of two years ago or as of July 17, 1952, I understand it is your testimony that immediately prior to your turning these 14 cars loose, there were 9 cattle cars on Track 13 adjacent to the icing dock? A. That's right.

Q. Did you go down to the icing dock after this accident occurred? A. No.

Q. Did you see deputies from the Spokane

(Testimony of James Crump.)

County Sheriff's [929] office out making an investigation out there? A. No.

Q. Mr. Crump, do you know it to be a fact that the cars between which Gerald Stintzi was caught by the impact of the 14 cars you had turned loose were Pennsylvania Railroad Car No. 77346 and Car No. 56160?

A. You say do I know that that was where he was injured?

Q. Yes? A. I do not.

Q. Between those two cars?

A. I do not know that, no.

Q. Handing you what is Plaintiff's Exhibit No. 50, a picture taken by the defense, have you ever seen that picture before? A. Yes.

Q. And you see in that Pennsylvania Car 77346?

A. Yes.

Q. Is that a stock car?

A. No, it is a boxcar.

Q. Well, don't you know as a fact that that Car 77346 was on Track 13 at and prior to 8:15 p.m., July 17, 1952?

A. This Pennsylvania Car 77346 is the most easterly car of the cut of 14 that they released up close to the yard office that drifted into No. 13.

Q. You are sure of that? [930]

A. I am sure of that.

Q. And you have no record, do you, of any of the numbers of any of the cars that were on Track 13 prior to 8:15 p.m. on the night in question?

A. Well, I believe if Mr. Prophet's switch list was

(Testimony of James Crump.)

ever brought up in this trial, that it would show.

Q. I mean the cars that were spotted there prior to 8:15, prior to turning loose the 14 cars?

A. Well, that should be—yes, there should be a check of those, of the cattle cars.

Q. Where would that be?

A. Well, I have seen the numbers of them, the ones that were pulled from the Armour stock track.

Q. Do you mean you have a record there at the yard office of the numbers of the cars on Track 13 prior to the time you turned these 14 cars loose?

A. I am only saying that I happen to know that I have seen the numbers of the stock cars in question, the ones that were placed on that track.

Q. On what record?

A. It was made on a switch list, a switch list I made out myself.

Q. That record hasn't been produced here, has it?

A. Not in the time that I have been here, no.

Q. Pardon? [931]

A. Not in the two days that I have been here.

Q. Then handing to you Plaintiff's Exhibit No. 48, a picture taken by the defense, have you seen that picture before? A. No.

Q. Can you identify the track shown in that picture? A. No.

Q. Can you identify the metal object on that track? A. No, I can't.

Q. Handing you what is marked as Plaintiff's Exhibit 49, have you seen that picture before?

(Testimony of James Crump.)

A. No, I haven't.

Q. Can you identify that track?

A. By the looks of the building here, it would be Track 13.

Q. Looking in which direction?

A. Well, now, let's see. Well, it would be looking in a westerly direction.

Q. Do you see any salt sacks in the picture?

A. I do in this picture, yes. One.

Q. And that salt sack is which direction from Track 13?

A. It is on the north side, this one sack.

Mr. Cashatt: I object to testifying what the picture is, Your Honor, when it isn't admitted in evidence.

Mr. MacGillivray: Well, I will ask the admission of [932] Plaintiff's Exhibit No. 49, taken by the defense.

On what day, Mr. Cashatt?

Mr. Cashatt: I don't know the date, Mr. MacGillivray.

Mr. MacGillivray: I ask its admission.

Mr. Cashatt: But I object to the offer of the exhibit, your Honor, until it is properly identified.

The Court: Well, I think it should be identified as to place and time of taking.

Mr. MacGillivray: If I knew who took it, I would do that, your Honor.

I presume the same objection would be made to 48 and 50?

Mr. Cashatt: That is correct.

(Testimony of James Crump.)

Q. (By Mr. MacGillivray): Well, Mr. Crump, one thing I think we have overlooked, would you step down here, please, sir?

Were you here when Switchman Craig testified yesterday, I believe? A. Yes.

Q. You heard his testimony.

The Court: It is hard to hear down at this end.

Q. (By Mr. MacGillivray): Did you hear his testimony that as the 14 floating cars went into and over Switch 13, he was standing opposite and 40 feet to the north of [933] Switch 9?

A. Yes, I heard that.

Q. Would you mark on that map just where Switch 9 is?

A. I would say this is Switch 9 (indicating).

Q. Would you write that in there?

A. (Witness complies).

Q. Thank you, sir. Step back.

Mr. Crump, when these 14 cars were turned loose in front of the yard office, were you in the office or outside? A. I was outside.

Q. And when they were turned loose, they were traveling about 3 miles per hour?

A. Very slowly, yes.

Q. Was that about the speed?

A. I would say that is pretty close.

Q. As a matter of fact, they were traveling so slowly that you wondered whether they would make it down to the ice dock on Track 13?

A. That is correct.

Q. The distance from the yard office to the ice

(Testimony of James Crump.)

dock is, as has been testified to, approximately 2,050 feet? A. That is pretty close.

Q. And, mathematically, traveling at 3 miles per hour, those floating cars would travel down the Old Main onto [934] the lead and into Track 13 at approximately 264 feet a minute; is that about right?

A. I will take your word for it, I haven't figured it.

Q. Well, what I am getting at, Mr. Crump, from the time those cars left the front of the yard office, it would take approximately 8 minutes for them to reach the icing dock?

Mr. McKevitt: Object, that is a matter of computation. If the witness on the witness stand can do it, why all right, but I doubt if he can.

The Court: Can you answer that without computation?

A. Not without figuring it out.

Q. (By Mr. MacGillivray): Well, let's see, 5,280 feet in a mile; 3 times that would be 15,840 feet.

A. Uh-huh.

Q. That those cars would travel in an hour at 3 miles per hour, is that correct? A. Yes.

Q. Dividing that by 60, you find out how much that traveled per minute. You might use my computations here. Is it not true that those cars would travel 264 feet a minute?

A. Yes, sir, according to the figures.

Q. So from the time they were turned loose until the time they had reached the ice dock would

(Testimony of James Crump.)

take approximately [935] 8 minutes, is that not correct?

Mr. McKevitt: Objected to as argumentative, your Honor.

Q. (By Mr. MacGillivray): Well, figure it out.

Mr. McKevitt: Just a minute, Mr. Gillivray.

Q. (By Mr. MacGillivray): Take your time, Mr. Crump, figure it out and tell us how many minutes it would take those cars at 264 feet per minute to go down 2,050 feet to that ice dock.

Mr. McKevitt: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overrule the objection.

A. Assuming it was exactly 3 miles per hour, that would be correct, it would be—let's see—264 feet per minute, divided into the length of it, would be, as you say, about 8 minutes.

Q. (By Mr. MacGillivray): About 8 minutes?

A. If it was 3 miles per hour exactly, yes.

Q. And what you and Mr. Prophet did after those cars were turned loose was to turn around and go to lunch?

A. I stayed there, yes, after the cars were definitely in the clear, we both——

Q. Just left and went to lunch?

A. That's right, he did and I went back in the office.

Mr. MacGillivray: That is all. [936]

Redirect Examination

Q. (By Mr. Cashatt): Mr. Crump, how far were

(Testimony of James Crump.)

the cars from the ice dock when you went back into the office? A. All of the cars?

Q. The first car to the east on this string of 14?

A. You want to know where the most easterly car was?

Q. Yes?

A. Well, I would say it was at least 15 car lengths into the track.

Q. And in feet, can you give it? Counsel has used in his computation here a figure of 2,050 feet.

A. Well, I would say, then, that easterly car of that cut of 14 was—let's see—about 600 feet, perhaps.

Q. So if you divided 264 into 600 feet, you would have about two minutes and a half, wouldn't you?

A. Uh-huh.

Q. Instead of 8. Now counsel asked you about a Pennsylvania Boxcar No. 77346. Handing you Exhibit No. 25, do you recognize that?

A. Well, this is the switch list that I wrote out, it is my handwriting, and gave to Foreman Prophet to take care of this move, moving of the cars from Track 43 to 13.

Q. And there are 14 cars listed on that list, are there? [937] A. Yes.

Q. And what is the number of the car that was the first car to go down Track 13 of those 14 cars? What is the number?

A. The easterly car was 77346. That was the Pennsylvania car.

Q. And so that car, Mr. Crump, was in the 14

(Testimony of James Crump.)

cars and was not on Track 13 when this switch movement started?

A. No, that was in the 14 cars.

Mr. Cashatt: I will offer Exhibit No. 50.

Mr. MacGillivray: Is that the exhibit you just objected to?

Mr. Cashatt: No, I didn't object to that one. You asked me about the others and I did object. That was the one you were talking to Mr. Crump about.

Mr. MacGillivray: Were these other pictures taken at the same time?

Mr. Cashatt: I believe they were.

Mr. MacGillivray: By the same person?

Mr. Cashatt: They were marked taken by Libby.

Mr. MacGillivray: I have no objection to Exhibit 50 if Exhibits 48 and 49 go into evidence at the same time.

Mr. Cashatt: I am confining my offer only to 50.

The Court: I think it should be admitted. It has been definitely identified by the witness as a particular [938] car. I assume the appearance of a freight car wouldn't change very much from time to time.

Mr. Cashatt: I will identify the picture further, your Honor.

Q. Handing you Exhibit No. 50, is that the Pennsylvania Car 77346 that you have listed on Exhibit No. 25, which you have told us was the first car to the east on the string of 14 cars that Mr. Prophet switched in on Track 13?

(Testimony of James Crump.)

A. It is the same car.

Q. Mr. Crump, counsel asked you if the white lights on the dock indicated to you that men were working around the dock. What is your answer to that question? A. Well, yes, they would be.

Q. Counsel, from his question, he had both of these things into one, so I will ask another question.

When the white lights are on the dock, does that indicate to you that men are working on or about cars?

Mr. MacGillivray: Objected to as repetitious. He said at least three times that it didn't.

Mr. Etter: That's right.

The Court: Overruled.

Mr. Cashatt: You chopped them all into one; I am going to separate them.

The Court: Overruled. [939]

A. That doesn't apply to working around cars.

Q. (By Mr. Cashatt): If the blue lights are on and the white lights are on at the same time, what does that indicate to you?

A. Well, the blue light means that these employees down there are apt to be working on or about the cars.

Q. Do you mean refrigerator cars?

A. Yes.

Q. Or salt cars? A. Or salt cars, yes.

Q. Now when the white lights are on the dock at night, does that give you any reason to anticipate that anybody is on the ground crawling under the couplers of stationary cars on Track 13?

(Testimony of James Crump.)

A. No.

Q. Counsel asked you some questions about the blue flag. In the daytime when they use the blue flag, is that attached to the dock or is that attached to the track?

A. In the daytime it would have to be attached to the track itself.

Q. And at night they use the blue light, is that correct? A. That's right.

Q. Counsel referred to a common dumping ground. Is there any such thing in the yards out there as a common dumping ground? [940]

A. Well, I wouldn't say "common." It is the refuse taken from the cars coming into our repair tracks and cleaning tracks—paper, pieces of boards and such as that—that is, the dumping is done there.

Q. And that debris, does that come from Northern Pacific freight cars?

A. From freight cars accepted in our cleaning tracks, yes. Not just Northern Pacific cars, boxcars.

Q. But any freight cars that are in your yards, is that right? A. That's right.

Q. Counsel showed you Exhibit No. 16, Mr. Crump, and asked you if you had in mind the fact that men might be working in this salt house at the time you put the 14 cars in motion down Track 13. Do you recall that? A. Yes.

Q. Now if they were working in the salt house or salt pit, would they be anywhere close to or around Track 13? A. They shouldn't be.

(Testimony of James Crump.)

Q. Would they be inside the building itself?

A. Yes, they would be working within the boundaries of the building.

Q. And they would not be outside, is that right?

A. They shouldn't be, no.

Mr. Cashatt: I will go ahead, your Honor, and ask a [941] few questions in between.

The Court: All right.

Q. (By Mr. Cashatt): Mr. Crump, counsel asked you some questions in regard to Rule 805. Does that rule say anything at all about members of the public or employees of Addison Miller or anybody else crawling under the couplings of stationary cars on tracks located in your switch yards or anywhere else?

Mr. MacGillivray: Just a minute. I object to that question on the ground that the rule speaks for itself, your Honor.

The Court: Well, I will overrule it, he may answer. You read only part of it.

A. This Consolidated Freight Code Rule covers only the N. P. employees, to my knowledge.

Mr. Cashatt: Your Honor, in view of the fact that they have introduced only a portion of Rule 805, I move that the entire rule of 805 be admitted to show that it had no application to the plaintiff in this case.

The Court: May I see that?

(Document handed to Court.)

Mr. Cashatt has offered the rest of Rule 805.

Mr. MacGillivray: No, no objection at all.

(Testimony of James Crump.)

Mr. Cashatt: Without waiving our previous objection to it, your Honor. [942]

The Court: Yes, all right. I don't see that it is material, but if you want it in, it is all right with me.

Mr. Cashatt: I would like to have the whole thing.

Mr. MacGillivray: We want to keep them happy.

The Court: Standing by bridges and churches, and so on.

All right, it will be admitted, then.

The Clerk: That will be Defendant's Exhibit 51, your Honor.

The Court: That will be Defendant's 51?

The Clerk: Yes, sir.

(Whereupon, the remaining portion of said Rule 805 was admitted in evidence as Defendant's Exhibit No. 51.)

DEFENDANT'S EXHIBIT No. 51

The Consolidated Code of Operating Rules and General Instructions Edition of 1945

805. When it can be avoided, engines must not stand within 100 feet of a public crossing, under bridges or viaducts, or in the vicinity of waiting rooms, telegraph offices, or near cars which are occupied by passengers.

Before moving cars or engines in a street, or on

station or yard tracks, it must be known that they can be moved with safety.

Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone. When cars are moved, they must be returned to their former location unless otherwise provided.

Cars containing livestock must not be switched unnecessarily or cut off and allowed to strike other cars.

Care and good judgment must be used in switching cars to avoid damage to contents and equipment, and it must be known that necessary couplings are made and that sufficient hand brakes are set.

When switching at stations or in yards where engines may be working at both ends of the track, movements must be made carefully and an understanding had with other crews involved.

When switching or placing cars they must not be left standing so close as to not fully clear passing cars on adjacent tracks or cause injury to employees riding on the side of cars. Cars must not be shoved blind or out to foul other tracks unless the movement is properly protected.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. MacGillivray): Mr. Crump, do I understand from you that the safety rules con-

(Testimony of James Crump.)

tained in the Consolidated Code, as applied by the Northern Pacific Railway, are only for the protection of Northern Pacific employees?

Mr. McKevitt: He is referring to Rule 805, if I [943] understood him right.

A. I did not mean to say that it was for the protection of only the employees, no, but it is the employees who have to abide by these rules.

Q. (By Mr. MacGillivray): Well, you made some remark that Rule 805 applied only for the protection of N. P. employees?

A. I was referring to the blue light, which means when the N. P. employees are working on or about cars in the yard, why we respect that blue light. I didn't mean to infer that no one else would be allowed any protection.

Q. Do I understand, then, that the blue light rule is only for the protection of N. P. employees?

A. No, there would be other employees that would be affected if they were protected by a blue light. They wouldn't have to be N. P. employees.

Q. Well, aren't your safety rules that you are supposed to abide by, including Rule 805, passed for the guidance and protection of all employees and of the public? A. I suppose, yes.

Q. Isn't that correct? A. Yes.

Q. As a matter of fact, you can be sure on it, don't you have a Northern Pacific Railway Company "Safety Rules [944] and Admonitions?"

A. Yes.

Q. And aren't you told on the booklet itself

(Testimony of James Crump.)

that those are for the protection not only of your employees, but for the public generally?

A. Yes, sir.

Q. That includes Rule 805, doesn't it?

A. Yes, it would, I suppose.

Q. Then, do I understand that you have some place in the Northern Pacific records a sheet similar to this showing the numbers of the cars that were on Track 13 prior to 8:15 p.m., July 17, 1952?

A. These 14 cars would not show on a check of No. 13?

Q. No, you misunderstood me. There were some number of cars on Track 13 prior to the time these cars were drifted in? A. Yes.

Q. Well, do you have some place in the N. P. records a sheet similar to this showing the number of cars on Track 13 and their numbers prior to the time that these 14 were drifted in?

A. The record, I believe, would be covered by a yard check taken of the Armour stock track where these 9 cattle cars came from. That would be a check of it or record of it, as you say. [945]

Q. Wouldn't you have a record like this drawn up as instruction to the switchmen showing the numbers and the number of cars that were switched into Track 13 between 7 p.m., when the fruit train left, and 8:15 p.m., when these 14 were switched in there?

A. As I stated before, there would be that check of them, yes.

Q. Well, where is that record?

(Testimony of James Crump.)

A. Well, that would naturally be the N. P. records. It comes out on a list similar to this.

Q. Well, where is it?

A. I couldn't say, I didn't present this.

Q. Nobody ever asked you to bring it down here?

A. No.

Q. Just one more thing, Mr. Crump. You say that when you have six or seven Addison Miller employees, men and boys, working in the salt pit taking salt up in the elevator, that they are not in the vicinity of Track 13?

A. They are not supposed to be.

Q. What do you mean they are not supposed to be?

A. They should be a safe distance away from the track where there is proper clearance so as to not be close to those cars, moving or standing still.

Q. Well, just step down here and point out to the jury [946] where they are working, five, six, or seven men working in that elevator pit and around the elevator?

A. If there is five or six or seven men working, most of them will be working inside of the limits of this building, and then possibly one or two men loading it onto this shaft that takes the salt up. It is controlled by a hoist, electric motor.

Q. Just point out here to the rest of the jury what you are talking about, the openings we are talking about.

A. Most of the men would be working inside this building (indicating) bringing salt over to this

(Testimony of James Crump.)

hoist, and one or two men, I suppose, would take the salt and load it onto this hoist, standing right here.

Q. And those men would be within 3 feet, at the outside, of any cars standing on that track 13 opposite that salt pit?

A. They should be at least 3 feet, yes.

Q. Well, they would be not more than 3 feet from it?

A. I never had occasion to notice the clearance. That would be probably pretty close.

Q. Well, did that enter your mind when you turned these 14 cars loose the evening of July 17, 1952?

Mr. McKevitt: Same objection as to what he had in mind.

The Court: I think it is repetition. [947]

Mr. MacGillivray: Well, it might be.

Q. Did you consider also that Addison Miller employees working in the salt pit, just as Northern Pacific switchmen, take time out once in awhile?

Mr. Cashatt: I object to that, your Honor.

Mr. McKevitt: How does Mr. MacGillivray know how much time they take?

The Court: I will sustain the objection.

Mr. MacGillivray: That is all, Mr. Crump.

Redirect Examination

Q. (By Mr. Cashatt): Oh, say, by the way, Mr. Crump, when you made up this switch list, Exhibit No. 25, who did you give that to?

(Testimony of James Crump.)

A. This switch list was given to Foreman Prophet.

Q. And that switch list does not come back as a company record, is that right?

A. No, this is just used until this move is completed, normally, and that is his records of the cars that I want moved and placed in a certain track.

Q. And the switch list that you made up for the movement of the 9 stock cars, or did you make one up for the movement of the 9 stock cars that came in?

A. It so happens that I did not. That is made up by a clerk. [948]

Q. And was that given to the switchman?

A. That's right.

Q. And after he uses it, does he return that switch list to the yard office?

A. No, I don't believe he does.

Q. And is there any Northern Pacific record, if the switch list isn't saved, that would show those 9 stock cars on Track 13 at the time we have been talking about here?

A. There is no record at that time, no.

Q. And the record you mentioned to Mr. MacGillivray, was that what you call the car spot record that is made at a certain time each day?

A. The yard check, yes.

Q. And if the cars had been moved off of Track 13 before 11 p.m. on the evening of July 17, '52, would there be any record of that?

A. Not if they were moved off of that track, no.

(Testimony of James Crump.)

Q. Now on Exhibit No. 16 that counsel mentioned, when the men are loading in the location you pointed out, Mr. Crump, that is where the elevator was? A. That's right.

Q. When they are there, they are actually working in a portion of the building, isn't that right?

A. That's right.

Q. And they are not working on the railroad track or out [949] close to it, are they?

A. Not on the track or shouldn't be close to it, no.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. MacGillivray): Mr. Crump, just briefly, to get this straight in my own mind, at least, this was a list made out by you and given to Switchman Prophet when you ordered him to switch 14 cars off Track 43 onto Track 13?

A. That's right, it shows that.

Q. And when any switch of that nature is made, cars from one track to another, it is done in that same manner? A. Yes.

Q. And when the fruit train left at 7 p.m., Track 13 was clear? A. Yes.

Q. So between 7 p.m. and 8:15 p.m., immediately prior to turning these cars loose, cars had been switched from some other track into Track 13?

A. 9 stock cars, yes.

Q. When you gave the orders—and you were the boss at that time? A. That's right.

(Testimony of James Crump.)

Q. You gave the orders to what switchman to switch them? [950] Did you give them to Prophet?

A. For this cut of cars?

Q. No, the previous cut of cars?

A. Foreman Sheppard.

Q. Foreman Sheppard. And you gave them in the same manner and on the same type of a slip as you gave that order? A. No.

Q. You didn't? A. No.

Q. How did you give that order?

A. I mentioned before that it so happened that the record of cars that he was to pull and bring down to me was made out by a clerk. Foreman Sheppard came in and asked me where I wanted these cars. I stepped outside with him and said, "13 is clear, put them in there."

Q. Well, whether you made out the record or a clerk made out the record, a record was made out?

A. Yes.

Q. You don't know where it is?

A. No, I don't.

Q. Just one more question: You said, talking about the blue flag used during the daytime, that that is used not on the dock, or should not be used under the blue light rule on the dock, but should be used on the end [951] of any cars on Track 13?

A. That's right.

Q. Does not the blue light rule apply exactly the same insofar as lights are concerned and blue flags are concerned?

Mr. McKevitt: Are you speaking of all classes

(Testimony of James Crump.)

of people on the premises or the Addison Miller?

Mr. MacGillivray: He can answer the question without any help, Mr. McKevitt.

Mr. McKevitt: Well——

A. State your question again.

Q. (By Mr. MacGillivray): Does not the blue light rule apply the same to blue lights and to blue flags?

A. The blue light would be covering the area that the men would be working, yes.

Q. Well, aren't both supposed to be on the ends of cars spotted on any particular track?

A. Spotted on the tracks, yes, for service.

Q. And the blue signals under the blue light rule, whether light or flag, are to be placed by the trainmen, are they not?

A. By the man in charge of the servicing.

Q. Yes.

Mr. MacGillivray: That is all.——

Q. In other words, Mr. Crump, the blue light rule reads as [952] follows, does it not——

Mr. Cashatt: I object to this, your Honor, I don't think it is proper recross.

Mr. MacGillivray: I think it is.

The Court: Well, do you want to put the blue light rule in evidence?

Mr. MacGillivray: I just want to ask him if it does not provide as follows:

The Court: Well, all right, overruled.

Q. (By Mr. MacGillivray): Does not the blue light rule apply as follows:

(Testimony of James Crump.)

“Rule 26. A blue signal displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it. When thus protected, it must not be coupled to or moved. Each class of workmen will display the blue signals and the same workmen are alone authorized to remove them. Other equipment must not be placed on the same tracks so as to intercept the view of the blue signals without first notifying the workmen.”

Isn't that the blue light rule?

A. That is the blue light rule.

Q. So whether it is blue lights or blue flags, they are [953] exposed on the ends of the cars and not on the dock, isn't that correct?

A. Well, according to that rule, yes.

Mr. MacGillivray: That is all.

Redirect Examination

Q. (By Mr. Cashatt): Mr. Crump, the practice that we have been talking about here for three or four days, we haven't been talking about the blue flag rule or blue light rule. What was the established practice between Addison Miller and the Northern Pacific Railroad for the placement of blue lights on Track 13 and Track 12?

A. Well, it was understood and agreed that prior to the time there was to be any servicing done on refrigerator cars or salt cars on those tracks, that a blue light would be turned on on each end of the dock, which would naturally govern and protect all cars within those boundaries, and that we would

(Testimony of James Crump.)

refrain from using that track or coupling into the cars while those blue lights were on.

Q. Who was to turn the blue lights on?

A. Well, Addison Miller employees, when they were getting ready to go to work on whatever they were going to do.

Q. And that was their responsibility? [954]

A. Oh, yes, strictly.

Q. Mr. Crump, in regard again to Exhibit 25 and the other list that counsel asked you about with regard to the cut of 9 stock cars, do you know if there is any record or any copies of that record of those 9 stock cars that was given to that switchman?

A. I would say there is records, yes.

Q. But do you know where we can locate such a record?

A. Well, I would suppose that you could get the record from the car clerk at Yardley—it takes care of stock cars being moved—Harold Lind.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. MacGillivray): There is just one question, Mr. Crump: In your 15 years of experience out there at the Yardley yards, have you not been instructed that regardless of the blue light rule, when there is any likelihood that men are working on or about cars, you should not depend upon your blue light rule?

A. They are not to work about cars without protection of that blue light.

(Testimony of James Crump.)

Mr. MacGillivray: Would you read the question back, please? [955]

(The question was read.)

A. I guess I have been instructed to that effect, yes.

Mr. MacGillivray: That is all.

A. Give them protection.

The Court: Any other questions of this witness?

Mr. MacGillivray: No, your Honor.

Mr. Cashatt: That is all.

The Court: All right.

(Witness excused.)

Mr. Cashatt: I may want to call another witness, your Honor.

Mr. Corrigan.

FRANCIS T. CORRIGAN

having previously been duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Cashatt): Mr. Corrigan, you have been in court during the discussion of switch list No. 25, and have you heard the other discussion concerning the list that was given for the movement of the 9 stock cars? A. Yes, I have.

Q. Does the Northern Pacific Railroad have any copy of that list that covered the movement of those 9 stock [956] cars?

A. Not at this date, I don't think. That man

(Testimony of Francis T. Corrigan.)

was given a list something similar to this. Probably when he got through with it, he threw it away.

Q. And you have looked and found——

A. I looked for it, yes, I looked for it definitely, and I couldn't find any copy of it at all.

Mr. Cashatt: That is all.

Cross Examination

Q. (By Mr. Etter): You didn't throw that list away, though, did you?

A. I didn't have anything to do with it, I wasn't even here.

Mr. Cashatt: Mr. Prophet brought that in.

Q. (By Mr. Etter): At least, it apparently wasn't thrown away or——

A. I don't know anything about that.

Mr. McKevitt: Object to that, your Honor.

The Court: Sustain the objection.

The Witness: I am all thorough?

The Court: I don't know. Wait.

Mr. Etter: That is all.

The Court: That is all, then, I guess. It appears to be. [957]

(Witness excused.)

Mr. Cashatt: Defendant rests.

The Court: All right, I will ask the jury to step out. Let's see, wait a minute.

Mr. MacGillivray: Could we take five minutes?

The Court: Yes, all right. We will take a five minute recess and please let me know if you have any rebuttal, because I am sure that at least for

the record the defendant will wish to renew the motion for directed verdict and that should be made, I presume, at the conclusion of the rebuttal.

Mr. Etter: Rebuttal will be very brief, your Honor.

Mr. MacGillivray: There will be some.

The Court: All right.

(Defendant Rests.)

(A short recess was taken.) [958]

The Court: All right, proceed.

Mr. Etter: Call Mr. Kallas, please.

Rebuttal.

GEORGE KALLAS

called and sworn as a witness on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination

Q. (By Mr. Etter): Your name is George Kallas? A. Right.

Q. Mr. Kallas, you will have to speak out in this courtroom, the acoustics are a little difficult, so all of these jurors can hear what you have to say, and also the other people in the court.

Where do you live, Mr. Kallas?

A. I live at 8608 East Bridgeport.

Q. And what is your present occupation?

A. A detective in the Sheriff's office.

Q. You are a detective in the Sheriff's office of Spokane County, is that correct? A. Yes.

(Testimony of George Kallas.)

Q. How long have you been with the Sheriff's office of Spokane County, Mr. Kallas? [961]

A. It will be four years in October.

Q. Four years in October, and I think you said you were in the detective division? A. Right.

Q. Did you receive a call concerning an accident that occurred at Yardley on July 17th of 1952?

A. Yes, I did.

Q. Do you recall when it was that the Sheriff's office received that call?

A. Well, the call came into the office at 8:20, according to the report.

Q. According to the report? A. Yes.

Q. And did you proceed on an investigation?

A. No, it was about 20 minutes later that I was notified that I was wanted over there.

Q. That you were wanted over there. What did you do, sir?

A. I went over to the Addison Miller Company located over there, and at this time there was nobody around other than part of the workmen were there.

Q. All right, did you have occasion at that time to talk with any representative or agent of the Northern Pacific Railroad?

A. Yes, after I arrived there, I first contacted two gentlemen who were there, I believe the name was [962] Vallarano and Mr. Johnson.

Mr. McKevitt: Object to that. He says Northern Pacific Railway Company employees; those are not Northern Pacific employees.

(Testimony of George Kallas.)

Q. (By Mr. Etter): You met two men?

A. I met two men.

Q. All right.

A. And I was taken, showed which train that the accident happened on, and while I was examining between the cars, Mr. Harrison of the special agent's office contacted me there.

Q. Special agent's office of who?

A. The railroad.

Q. Northern Pacific Railroad? A. Yes.

Q. All right, did you make a physical investigation of the area where the accident had occurred?

A. Yes.

Q. And will you state what you found?

Mr. McKevitt: That is objected to, at least in the form of it, because it can't be determined at this time, if the Court please, whether it is rebuttal testimony or not. The way the question is framed now it could be very well considered part of their case in chief.

The Court: Will you limit that somewhat? [963]

Mr. Etter: I have got to lay a foundation, I think, in order to employ the rebuttal testimony here, your Honor. It is as to the car that was involved.

The Court: Well, you asked him what he found in his investigation in and around the track at the scene of the accident; is that what you had in mind?

Mr. Etter: That is correct.

The Court: All right, go ahead.

(Testimony of George Kallas.)

Q. (By Mr. Etter): What did you find in your investigation around, in and about the particular scene of the accident?

A. By being directed to the train, I started checking from where this happened, and by following up the blood stains on the wheels of the car I found between which cars this was supposed to have taken place.

Q. And how did you determine that? How did you find out between which two cars?

Mr. Cashatt: Object to this——

Q. (By Mr. Etter): What did you find?

Mr. Cashatt: ——your honor, as to what he concluded. No objection to what he saw.

Q. (By Mr. Etter): All right, what did you see?

Mr. Cashatt: He wasn't there.

Q. (By Mr. Etter): What did you see?

A. I found streaks of blood on the wheels——well, it [964] would be what I would call the front wheels, it would be the east wheels of the car involved in this.

Q. Did you find any blood——

Mr. Cashatt: I object to the car involved in this. He wasn't there, your Honor.

The Court: Well, on a certain car, we'll say.

Q. (By Mr. Etter): You found blood stains or streaks of blood on the wheels of a certain car?

A. Right.

Q. Is that right. Did you find blood stains or blood on the wheels or trucks of any other car?

(Testimony of George Kallas.)

A. No, I didn't.

Q. You did not?

A. Other than—I will take that back—other than where cars had rolled along the track, just on the bottom part of the wheels.

Q. On the bottom part?

A. The bottom part of the wheels.

Q. And on this particular car that you refer to, you found the blood and the blood stains was not only on the bottom of the wheel, but on other parts of the trucks? A. Right.

Q. Where was it on the other parts of the trucks?

A. It was on the outside, it would be the north side of the wheels. [965]

Q. The north side of the wheels?

A. Right.

Q. And this car that you speak of, was that the only car where you found that condition?

A. Yes.

Q. And do you know what the number of that car was?

A. I have the numbers of both cars involved.

Mr. Cashatt: Your Honor—

The Court: Counsel objects to your saying “involved.”

Q. (By Mr. Etter): Have you the number of the car upon which you found the blood stains on the flat part of the wheel and on the outside, as you have described in your testimony?

A. I have the number, yes.

(Testimony of George Kallas.)

Q. Will you tell us what number that was?

A. I can't tell you which number it was, I can give you the numbers of that car and the car ahead of it. I didn't—

Q. Beg your pardon?

A. I can give you the numbers of the car ahead and the car that had the—they were coupled together.

Q. All right, what are the numbers of those two cars?

A. May I read them?

Q. You may refresh your recollection. [966]

The Court: That is a memorandum you made yourself?

A. This is a record I made.

Q. (By Mr. Etter): To refresh your recollection, just find the numbers of those two?

A. The two numbers involved here was "Pa. 77346" and the other one was "Q 56160."

Q. Of those two cars, that is, referring to 77346 and 56160, upon which of those cars or the trucks of which of those cars or wheels did you find the blood stains which you have described?

A. I can't be sure on that.

Q. You can't be sure?

A. I can't be sure.

Q. Will you tell me whether or not those two cars were coupled together, however?

A. They were coupled.

Q. At the time of your investigation?

A. They were coupled.

Mr. Etter: That is all. Just a minute.

Mr. MacGillivray: Is 50 in evidence?

(Testimony of George Kallas.)

The Clerk: 50 is. I haven't got it marked.

The Court: It is exhibit number——?

The Clerk: 50, your Honor.

Mr. Etter: It hasn't been marked, but I understand it has been admitted as an exhibit. [967]

The Court: 50 has been admitted?

Mr. Etter: Yes, your Honor.

The Court: All right.

Q. (By Mr. Etter): I am handing you Plaintiff's Exhibit 50 and ask you to examine that picture and the cars which appear there. Can you tell me whether or not you remember seeing any of those cars before this, let's put it that way?

Mr. Cashatt: What was that question again?

Q. (By Mr. Etter): Well, do you recall seeing the car there that you found that night, either of the cars?

A. Well, the car with the number here would jibe with my report.

Q. And what number is that? A. 77346.

Q. And is that the report that you have?

A. That is the report that I filed in the office.

Q. And that was the car that was coupled on the one when you got there? A. Yes.

Q. You don't recall which of those two cars you found the blood stains on this wheel on the north side and also on the flat side of the truck?

A. Right.

Mr. Etter: That is all. [968]

(Testimony of George Kallas.)

Cross Examination

Q. (By Mr. Cashatt): Mr. Kallas, how many cars did you look at out there that night?

A. I went up to—I would have to make a guess, I believe that it was approximately 9 that I checked. No, I will take that back, I looked from where this took place up to one of these two numbers, between those, and then two cars ahead of that, would probably be about five cars, I imagine.

Q. Did you check out there to see 9 stock cars in that string of cars? Did you make any note of that?

A. There was cars in that string, but I couldn't definitely tell you what it was.

Q. Well, did you make any note of how many stock cars you saw in that string?

A. No, I didn't.

Q. Did you look under any of those stock cars, on any of the under-running carriage, to see if there was any blood on any of those?

A. No, I only, as I said before, I checked from the place that this took place and east, and just from there east to where the cars were stopped.

Mr. Cashatt: That is all.

The Court: Is that all? [969]

Mr. Etter: That is all.

(Witness excused.)

Mr. Day.

JOHN T. DAY

called and sworn as a witness on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination

Q. (By Mr. Etter): State your name, sir.

A. John T. Day.

Q. Where do you reside at the present, Mr. Day?

A. Richland, Washington.

Q. How long have you resided in Richland, Washington?

A. Approximately 19 months.

Q. What is your occupation?

A. I am an attorney.

Q. And are you employed by somebody particularly?

A. Yes, I am employed by one of the contractors, Kaiser Engineers, at Richland, Washington, as a resident attorney.

Q. Mr. Day, did you make an investigation of the accident which involved Gerry Stintzi some time on or about the first week or so in August of 1952?

A. I did. [970]

Q. And at that time, did you have a conversation with a man by the name of Fincher who was the foreman at the Addison Miller icing dock?

A. I had two conversations, one short, one rather lengthy.

Q. And when was it that you had the lengthy conversation with him, if you recall?

A. It was approximately August the 9th, 10th or 11th, around that time.

(Testimony of John T. Day.)

Q. Of the year 1952? A. 1952, yes.

Q. Who was present at that discussion?

A. The last discussion, Mr. Fincher and myself, and during the discussion a couple of workers walked up. They didn't take in the entire discussion, but they——

Q. And would that be the discussion that I inquired of Mr. Fincher about and he testified here?

A. That was the discussion.

Q. I will ask you whether or not at that time Mr. Fincher stated to you, in substance and effect, that he was not expecting a switch and that he did not think the blue lights were good enough to be seen, anyway?

A. In form and substance, yes. More particularly, however, he said he was not expecting a floating switch of that nature.

Q. That was the statement that he made to you?

A. That's right.

Mr. Etter: That is all, sir.

Cross Examination

Q. (By Mr. McKevitt): Mr. Day, this accident happened on the 17th of July, 1952, did it not?

A. That's right.

Q. And at that time you were practicing law in Spokane? A. That's right.

Q. With what firm?

A. The firm of Keither, Winston, MacGillivray and Repsold.

(Testimony of John T. Day.)

Q. Mr. Etter wasn't in the lawsuit when the first complaint was filed, was he?

Mr. Etter: Is there something objectionable about that, Mr. McKevitt?

Mr. McKevitt: No, I think you have added to the dignity of it.

Mr. Etter: I appreciate that statement.

Mr. McKevitt: Are you objecting, is the gentleman objecting, your Honor?

The Court: I think not. Go ahead.

Mr. Etter: No, that is complimentary.

A. No, Mr. Etter was not in the lawsuit at that time.

Q. (By Mr. McKevitt): When did you first become connected [972] with the lawsuit? What I am getting at is this: Were you the original attorney for Mrs. Stintzi and Gerald, or what?

A. I was one of the original attorneys, yes.

Q. Mr. MacGillivray didn't go out there with you on either one of these occasions?

A. Not on that occasion, no.

Q. Well, you said you were out on two occasions, you talked to Fincher on two occasions, did you?

A. That's right.

Q. On different dates? A. That's right.

Q. What was the first date you talked to him?

A. The day before this particular occasion we are discussing.

Q. And you had been employed or the firm had been employed to represent the Stintzis at that time? A. That is correct.

(Testimony of John T. Day.)

Q. In an action against whom?

A. The action against the Northern Pacific Railroad.

Q. Not against Addison Miller?

A. Well, now, when you speak of employment, Mr. McKevitt, I'm afraid I don't understand the question.

Q. Well, I am not speaking—

A. Are you asking me what my relationship with my client [973] was?

Q. That isn't my question. Investigating this matter for the purpose of instituting an action, I asked you against whom, you said the N. P., is that correct?

A. Yes, investigating the facts surrounding the action, which had already been filed at that time.

Q. For the purpose of placing legal responsibility on somebody, is that true?

A. No, that is not true.

Q. It is not true?

A. No, not placing legal responsibility.

The Court: I'm not sure that the witness understands your question, Mr. McKevitt. Are you asking if the purpose of the action was to place the responsibility or the purpose of his visit?

Mr. McKevitt: The purpose of the action that was to be instituted, yes, your Honor.

Mr. Etter: He stated it already had been instituted.

The Court: I assume that it usually the purpose.

Mr. Etter: Yes.

(Testimony of John T. Day.)

The Court: Go ahead.

Mr. McKevitt: Thank you.

Q. Mr. Day, what was the question that you put to Mr. Fincher in connection with this happening that elicited this answer? What did you ask him?

A. I asked him for his version of how this accident happened.

Q. Is that the way you put it?

A. That is one of the questions I asked him.

Q. And what did he say, what version did he give you?

A. He said, "I am not going to make any statement for you because I have already been instructed not to."

Q. By whom?

A. By the Northern Pacific claims agent.

Q. Well, then, did you pursue the discussion further? A. I certainly did.

Q. Didn't he tell you that he had given a statement to Mr. Thomsen? A. That's right.

Q. If you wanted to find out anything about it, you could go down and take a look at that statement? A. That was part of it, yes.

Q. Yes, he told you you should go and look at the statement, didn't he?

A. No, not that I could look at the statement; that if I wanted any information, I would have to go down and get it from Mr. Thomsen.

Q. Well, you knew that you were entitled to look at that statement, at least, under the rules of this

(Testimony of John T. Day.)

Court and Rules of Procedure; you knew that, didn't you? [975] A. Certainly.

Q. Yes. And all statements that we took have been furnished to you people, have they not?

Mr. Etter: I don't know that this is part of the cross examination, your Honor. It is interesting, but I don't know what it has to do with my direct examination.

The Court: Well, I think it does go beyond the scope of the direct somewhat.

Mr. McKevitt: I didn't know there was an objection on that ground.

Mr. Etter: You can proceed.

Mr. McKevitt: All right.

A. Do you want the answer, Mr. McKevitt?

Mr. Etter: Yes.

A. We have received what statements you took or the ones that we demanded under the procedure, yes. Didn't have them at that time.

Q. (By Mr. McKevitt): And including Mr. Fincher's? A. Yes, we certainly have.

Q. You have read Mr. Fincher's statement?

A. Yes, I have.

Q. Is there anything in that statement, as you recall, with reference to the fact that these blue lights weren't any good or couldn't be seen?

A. No, there isn't. [976]

Q. No. Did you ask him anything about blue lights?

A. I followed up with some questions when he brought up blue lights, yes.

(Testimony of John T. Day.)

Q. My question was, then you say he followed up with blue lights?

A. I followed up with some questions after he broached the subject of blue lights.

Q. What did you ask him about the blue lights?

A. I asked him if, as he stated, the blue lights weren't on, why they weren't on.

Q. Uh-huh. But before you went out there, you knew, did you not, that it was the practice of Addison Miller on occasions, at least, when icing cars, to have the blue light on that dock? You knew that when you went out there, didn't you?

A. I didn't, I went out there to find out what the practice was.

Q. What the practice was? A. Yes.

Q. Didn't you ask him, "Wasn't there a blue light on this dock?" or "Was there a blue light on this dock?"

A. No, I didn't ask him that, he brought it up. He answered that or interjected that gratuitously.

Q. He just volunteered the fact that there was no blue light on the dock and, if there had been one, it [977] wouldn't have been any good, or something like that; is that true?

A. Well, not in the way you put it. I'll tell you what he did say, if you like.

Q. Well, tell me what he said.

A. He said, "I feel very sorry for the kid. You know what my situation is, however. But I don't think it was my fault, except that I didn't put up the blue lights. But it wouldn't have made any dif-

(Testimony of John T. Day.)

ference, anyway, because with these lights on at that particular time of the day, the lights are so poor, the blue lights are of such poor quality, that I don't think they can be seen, anyway, and I don't usually put them on at that time."

Q. The reason, then, he gave for not putting them up, he didn't think at that time of day they could be seen, is that right?

A. Under those conditions, that's right.

Q. Meaning the weather conditions?

A. No.

Q. Did you ask him anything on that particular date about cleaning out the slush pit?

A. Yes, I think I did. I think I asked him about everything we had knowledge of or felt would be an issue in the case. [978]

Q. Who had you talked with, if anyone, about this accident before you talked to Fincher?

Mr. Etter: That is improper cross examination, who he had talked to before he talked to Mr. Fincher?

Q. (By Mr. McKevitt): That purported to know anything about how this accident happened?

Mr. Etter: I still object to that. I don't think it is harmful, but we can be here, as your Honor says, for a week.

Mr. McKevitt: I object to counsel's statement.

Mr. Etter: This has to do with conversation with Mr. Fincher.

The Court: We will see how far it goes. Overruled.

(Testimony of John T. Day.)

Mr. Etter: All right.

A. Would you read the question again?

(The question was read.)

Q. (By Mr. McKevitt): Who purported to know anything about it?

A. That purported to know anything about it? I talked to Gerald Stintzi, I talked to Mrs. Stintzi, I talked to the nurses.

Q. Well, I mean how the accident happened now, that actually knew how it happened or purported to know how it happened?

A. All of these people claimed they knew how it happened. [979] Do you mean eye witnesses?

Q. Yes, or employees of Addison Miller, put it that way?

A. I talked to a couple of workmen around there who were on the shift at the time. They supposedly knew something about it, having been at the accident scene afterwards. I talked to——

Q. Give us the names.

A. I talked to Gerald Stintzi and that was——

Q. Let's put it this way, did you go out there with a man by the name of Johnson?

A. On that occasion or prior occasion?

Q. On any occasion?

A. Yes, I went out there with a man by the name of Johnson.

Q. What date was that?

A. I believe one day prior to this conversation we are talking about.

(Testimony of John T. Day.)

Q. The first time you went out, you went out with Johnson, is that correct?

A. Johnson and others.

Q. Well, who was Mr. Johnson?

A. Mr. Johnson was a workman, or claimed to be a workman, on that crew at that time.

Q. And you knew Mr. Johnson before you went out there, didn't you? [980]

A. I had met Mr. Johnson, yes.

Q. What?

A. Yes, I went out with him.

Q. You had found out that he was working there for Addison Miller at the time Gerald was hurt, didn't you? A. That's right.

Q. And you interviewed him before you went out to talk to Fincher, didn't you?

A. That's right.

Q. And you asked him about the blue lights, too, didn't you?

A. No, I don't believe I asked him about the blue lights.

Q. Did he tell you anything about the blue lights? A. He probably did.

Q. Yes.

A. I didn't question Mr. Johnson, if that is what you mean.

Q. Well, you said he probably told you; as a matter of fact, he told you the blue lights were not on, didn't he? Johnson told you that?

A. He probably did, because I know I knew it at

(Testimony of John T. Day.)

that time, or I knew that there was a question at that time.

Q. You felt that there was a question at that time as to whether they were or were not on, isn't that true?

A. That's right, it was one of the issues. [981]

Q. And that was one of the questions that you wanted to have answered, wasn't it?

A. Well, I would suppose so, Mr. McKevitt.

Q. Was Mr. Johnson working for Addison Miller at the time you went out there with him?

A. I don't believe——

Q. August 10th or 11th of '52?

A. No, I don't believe so, Mr. McKevitt.

Q. When did you first meet him?

A. On the occasion of the first visit out at Addison Miller by me.

Q. Oh, he just came up and introduced himself or joined in the conversation?

A. No, he went out there with us.

Q. Oh, I see. That is what I am trying to get at.

A. Fine.

Q. Then, he had been in your office, or the office of the firm you were with, before you went out there and after the lawsuit was started?

A. I don't know, Mr. McKevitt. I presume that he had been to our office that morning to go out with us.

Q. And where is Mr. Johnson now?

A. I have no idea.

(Testimony of John T. Day.)

Q. Has he been in this courtroom since the trial started? A. He has. [982]

Q. Where did he come from?

A. Seattle, Yakima, one of those two places, I don't know.

Q. He was asked by the attorneys representing the plaintiff to come over from the Coast to appear as a witness, wasn't he? You know that?

A. I believe that he was.

Q. You what?

A. I believe that he was. I don't know, I didn't make out the list of witnesses and I didn't participate in that part of it. I would assume that he was.

Q. And he was instructed by some one of the attorneys for the defense to return to Seattle, wasn't he? A. He was not.

Q. Or for the plaintiff?

A. I don't know, I don't believe he was. He certainly wasn't instructed by me to that effect.

Q. Mr. Day, you have been sitting here in the courtroom during the whole course of the trial, haven't you? A. That's right.

Q. And you were present when the deposition of Gerald was taken, weren't you? A. No.

Q. Well, you were when Mr. Prophet's deposition was taken in my office?

A. Yes, I was. [983]

Q. You came up from Richland for that purpose, didn't you? A. Yes.

(Testimony of John T. Day.)

Q. You, as an attorney, still have an interest in this lawsuit, don't you? A. That's right.

Q. Yes. Now did you ask Mr. Fincher that night anything about the number or type of cars that were on that track?

A. No, I don't believe I did, Mr. McKevitt.

Q. Did you know when you went out there that Gerald got hurt as the result of passing an ice bucket underneath couplers of coupled cars? You knew that?

A. Yes, while doing that, yes.

Q. Did you ask Mr. Fincher how many cars were east of the string?

A. I don't believe that I did, Mr. McKevitt, except in the general request for information about the accident.

Q. Did you ask him how many cars were east or west of the point of accident?

A. The answer is the same, I don't believe that I did specifically.

Q. Did you ask him whether or not he had instructed Gerald and Allan Maine to crawl under cars and dump this slush north of 13?

A. I believe that I did. [984]

Q. And he told you that he had seen them doing it and told them to quit doing it, didn't he?

A. He did not. My recollection is that is one of the things he refused to comment on.

Q. He wouldn't say yes or no as to whether he instructed them or not to carry that work out in that fashion?

(Testimony of John T. Day.)

A. As I say, it is my recollection that that is one of the questions he referred me back to the railroad on.

Q. Well, then, I take it from that that you did ask him whether he gave Gerald instructions to dump this ice in the manner in which he was dumping it? You did ask him that?

A. I may have, I believe that I did, that is probably one of the questions that I asked him.

Q. And after you gathered the information that you did on these two investigations, you instituted an action? No, that was pending before. Prior to that visit out there and 12 days after the accident, you instituted an action, did you not?

The Court: That is repetition. He said he instituted an action before he went out.

Mr. McKevitt: As to the time element, your Honor, I don't think that was—

The Court: Why is that material?

Mr. McKevitt: Very well. [985]

The Court: Proceed with the cross examination.

Mr. McKevitt: That is all.

Mr. Etter: That is all, Mr. Day.

(Witness excused.)

Allan Maine, will you come forward, please? You have been sworn, you can take the stand.

ALLAN MAINE

having previously been sworn, resumed the stand in rebuttal, and testified further as follows:

Direct Examination

Q. (By Mr. Etter): You have testified heretofore in this case, Allan? A. Yes.

Q. Now you keep your voice up, it is important that we hear you. Have you been here during the testimony of Mr. Fincher? A. Yes.

Q. And were seated in the courtroom, were you? A. Yes.

Q. Now, Allan, I will ask you this: Did you hear his statement that he gave you and Gerald instructions to dump the ice north of Track 13 somewhere down near the slush pit? He gave you the instructions down by the slush pit? [986]

A. No.

Q. No, but you heard him say that?

A. Oh, yes.

Q. Yes. Is that or is that not the fact?

A. That isn't the fact.

Q. And you heard him say that at that time there were about 15 fellows around; is that the fact or not the fact? A. That is a fact.

Q. No, but I mean around the slush pit when he gave the instructions? A. No.

Q. Beg your pardon?

A. There was no one there.

Q. All right, where were the instructions given to you, Allan? A. At the top——

(Testimony of Allan Maine.)

Mr. McKevitt: He has already testified they were given up on top of the dock.

Mr. Etter: All right.

The Court: Go ahead.

Q. (By Mr. Etter): Where were you when you received your instructions?

A. On top of the dock.

Q. Now I will ask you whether or not, when you and Gerald [987] came back across Track 13 with an empty bucket, at any time after you received your instructions, did you see Mr. Fincher?

A. I did not see Mr. Fincher at any time, no.

Q. Did you and Gerry at any time have any conversation with Mr. Fincher after he gave you your directions as to what you ought to do?

A. None.

Q. Did Mr. Fincher at any time stand in the doorway and warn you boys about going across Track 14 between the cars? A. He did not.

Q. 13, beg your pardon? A. No.

Q. He did not? A. He did not.

Q. And when was the first time that you saw Mr. Fincher after he gave you and Gerry your instructions on dumping the slush?

A. After the accident when I went up on top of the dock.

Q. And where was he at that time?

A. I believe——

Q. Mr. Fincher?

A. He was on top of the dock.

Q. He was on top of the dock? [988]

(Testimony of Allan Maine.)

A. Yes.

Mr. Etter: That is all.

Cross Examination

Q. (By Mr. McKevitt): You mean that after you went up on top of the dock and after the accident, Allan, if I understood you correctly, not to do that again, something like that?

A. Beg pardon?

Q. Did he give you some instructions—maybe I wasn't paying close enough attention—after the accident and after you went up on the dock, did you have some conversation with him then?

A. After the accident?

Q. Yes? A. I did.

Q. Well, what was that conversation about?

A. It was after the accident and I told him that I was through, I wasn't going to work a minute longer. Right there I quit.

Q. Well, did you tell him at that time, explain to him that you had been crawling under these couplings? A. I did not.

Q. You didn't tell him that?

A. No. [989]

Q. Did you tell him that at any time?

A. No.

Q. At the time he gave you these instructions, he did not tell you to crawl under those couplers, either, did he? A. No.

Mr. McKevitt: That is all.

(Testimony of Allan Maine.)

Mr. Etter: That is all, then.

(Witness excused.)

Gerry.

GERALD STINTZI

having been previously sworn, resumed the stand in rebuttal, testified further as follows:

Direct Examination

Q. (By Mr. Etter): Gerald, you have been seated here in the courtroom during the testimony of Mr. Fincher, is that correct? A. I have.

Q. Do you remember Mr. Fincher?

A. Yes, I do.

Q. Have you seen him since the accident, Gerry?

A. No, I haven't, just in the courtroom.

Q. Until he came into court, is that correct?

A. That is correct.

Q. Gerry, were you and Allan Maine standing anywhere near [990] the so-called slush pit when Mr. Fincher gave you instructions to take the slush ice out and dump it north of Track 13?

A. We were all standing around where the salt comes up, that salt gig.

Q. The salt gig? A. That is correct.

Q. Is that the salt gig that appears in the exhibit numbered 9, Gerry?

A. That is correct.

Q. And you say there were a group of you around there at the time?

A. Yes, we were all scattered around.

(Testimony of Gerald Stintzi.)

Q. Is that where you received your instructions on the cleaning out of the slush pit?

A. That is correct.

Q. And that was when he instructed you and Vallarano and this Canadian and Allan Maine to perform that?

A. That is correct.

Mr. McKeivitt: I object, this is not proper rebuttal, your Honor.

The Court: I think it is repetition. Confine the examination to matters of which Mr. Fincher testified.

Q. (By Mr. Etter): Were 15 men along with you or Mr. Vallarano or Allan Maine gathered around the slush pit [991] when you received those instructions?

A. We were not.

Q. Now after you received the instructions about taking the slush ice out of the pit and dumping it north of the tracks, Gerry, did you see Mr. Fincher again that evening?

A. I did not.

Q. And you heard his testimony here that he was in the doorway and talked to you and Allan when you came back, or at least he saw you come out from behind a car with a bucket; you heard that testimony?

A. I did.

Q. Did you see him at that time?

A. I did not.

Q. Did he make any statement to you at that time as he testified here?

A. He didn't say a word.

Q. Did he say anything to you or did you talk

(Testimony of Gerald Stintzi.)

with him at any time from the time you received your instructions until after this accident?

A. I couldn't even talk to him when I couldn't even see him.

Q. You didn't see him, is that it?

A. No, I didn't.

Q. And he did not give you any such instructions? [992]

A. No, he didn't.

Q. I will ask you this, Gerry: At any time that you were taking the bucket and dumping the ice, at any time did you and Allan both go under the coupler or between the cars together?

A. No, it would be half impossible to get two guys——

Q. No, but did you do it? A. No.

Q. Is it a fact that on all occasions either one or the other was on one side or the other of the coupler?

A. That is the way we worked it.

Q. That is the way you worked it?

A. Yes.

Mr. Etter: That is all.

Cross Examination

Q. (By Mr. McKeVitt): But one or the other of you to get to the north side of the track and from there back would have to crawl under the couplers and under those hoses that were disconnected there, isn't that true?

A. Just one of us.

Q. Just one? A. That is correct.

Q. But at the time you were coming from the north to the [993] south, you were in the process

(Testimony of Gerald Stintzi.)

of crawling under one of those couplers, weren't you? A. Could you repeat that again?

Q. Pardon me. At the time you had your accident, were you not in the process of crawling under the couplers to go back and get another bucket of ice?

A. I was just handing him the bucket when my leg was across for support, that is when the wheel hit the back of my leg.

Q. You were in between the rails, I mean by that?

A. My legs were straddled across the rails.

Q. One leg to the north and one leg to the south? A. That is correct.

Q. And were you handing the bucket under or over the coupler? A. Under.

Q. Under the coupler? A. Yes.

Q. Then after you handed the bucket to Allan, then you crawled under the coupler or started to crawl under the coupler before you were hurt?

A. No, I was hit, I was hit and I had my hand—I can't recall exactly, but I had my hand somewhere near the bucket, and bam and that was it.

The Court: I think what Mr. McKevitt was inquiring, that was on the prior trips before you got hurt, isn't that right?

Mr. McKevitt: Yes, your Honor.

A. Oh, yes, before the accident, I would just bend over and go right underneath.

Q. Just before the accident? A. Yes.

Q. After you had handed the bucket to Allan?

(Testimony of Gerald Stintzi.)

A. He would take the bucket and then I would go under.

Q. You were in the process of bending over to crawl under the coupler, one leg in between the rails and the other leg out, when you were hurt, weren't you? In this fashion (indicating), getting down low?

A. You mean before I was hurt?

Q. No, just after you had handed the bucket back to Allan and before you were struck, what was your position?

A. At the time when I was struck, my position, if you spread your legs and bend over a little bit and—no, not that far, up a little higher. The coupling was over to your right just a little bit, over to your right. Put your hand back. All right, down there, it would be about the ground right there, and the bucket was on the ground like that, and it hit me from behind and hit my right leg.

Q. Just before that, your intention was to crawl under the [995] coupler?

A. No, I handed him the bucket. I can't get through there with a bucket.

Mr. McKevitt: I see. That is all.

Mr. Etter: That is all.

(Witness excused.)

Mr. MacGillivray: Your Honor, one thing we overlooked in our case in chief, and that is a stipulation that counsel entered into that the life expectancy of Gerald Stintzi on July 17, 1952 was 44.27 years.

The Court: I think the Court takes judicial notice of life expectancy. The table has been recognized by the Supreme Court of the State of Washington. If you want me to take the time to look it up, I can do it.

Mr. Etter: We know what it is.

Mr. McKevitt: That isn't the point.

Mr. MacGillivray: Mr. Cashatt, are we stipulating that his expectancy was 44.27 years?

Mr. Cashatt: That is correct.

Mr. Etter: That is all.

Mr. MacGillivray: Plaintiff rests.

(Plaintiff Rests.)

The Court: Any other testimony? [996]

Mr. McKevitt: No surrebuttal.

The Court: I will excuse the jury, then, for a recess.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: You wish to renew your motion, I assume, don't you?

Mr. McKevitt: The plaintiff having rested and all of the evidence being in, the defendant now renews the motion for directed verdict made at the close of the plaintiff's case, and moves the Court to direct a verdict in favor of the defendant for the reasons and upon the following grounds, to-wit:

(1) That there has been no evidence introduced in this case showing any actionable negligence upon the part of the defendant railway company or its

employees which was a proximate cause of the accident;

(2) That the evidence conclusively discloses that at the time and place in question, he was not in the position that he was in with the knowledge, consent or permission of the defendant railway company and, consequently, his status was that of a trespasser to whom we owe no duty except to refrain from wilful or wanton injury, which could have no application because no showing was made that we had [997] any knowledge of his being in a position of danger at the time these cars were drifted into the siding; and

(3) That in any event, the plaintiff himself is guilty of contributory negligence as a matter of law.

I won't pursue the argument further. I assume your Honor—

The Court: Well, the motions will be denied, with the privilege, of course, of renewing them if it becomes necessary—

Mr. McKevitt: Yes.

The Court: —ten days after the verdict.

Mr. McKevitt: Now I believe that at this time I am permitted, if your Honor pleases, to make a motion to the Court for the purpose of requesting the Court to withdraw certain allegations of the amended complaint and the statement of issues.

The Court: Yes, I had in mind taking that up with you if you didn't make the motion. I have to instruct the jury on what the plaintiff's contentions are, and I think even though no motion were made, I would probably be responsible if I put something

in that hadn't been sustained by substantial evidence.

I think they are contained in the plaintiff's statement of contentions, substantially, I think, identically, as they were in the amended complaint, aren't they? [998]

Mr. MacGillivray: Yes.

Mr. Etter: Almost identically.

The Court: Paragraph VII, Page 3.

Mr. McKevitt: Then with the understanding that it is the position of plaintiff's counsel that the statement of the issues is as broad as all of the charging allegations of the amended complaint, I take it it will not be necessary to address my motion to the amended complaint separately from the statement; is that correct?

The Court: It may be understood that your motion goes to both, if you like.

Mr. McKevitt: Very well.

The Court: You are asking to withdraw those contentions.

Mr. McKevitt: I make the general motion that the Court withdraw from the consideration of the jury any allegation in the amended complaint or in the statement of the issues to the effect that at the time that this boy was hurt, he was engaged in actual car-icing operations, for the reason and upon the ground there is no evidence of any kind or character to substantiate such an allegation.

I assume your Honor would want to rule on them seriatim as we go along?

The Court: Let's see now, I had in mind with-

drawing No. 5: "The defendant, its agents and servants in charge [999] of such switching operations which resulted in said cars being switched against those being iced and on which the said Gerald Stintzi was working." There is no evidence that he was working on a car that was being iced or that there were any cars being iced at the time.

Mr. McKevitt: Do I understand that your Honor has ruled that that motion is well taken?

The Court: Yes, of course, yes, I think it is. I will hear the other side.

Mr. Etter: As to what car-icing operations?

The Court: Your contentions which state that either directly or indirectly the defendant moved cars against cars there were being iced and on which Gerald Stintzi was working.

Mr. Etter: No, I think the evidence shows they were not being iced, but there was a conflict in the evidence as to whether or not an icing operation was being carried on by virtue of unloading of salt.

Mr. McKevitt: Our position in that regard, counsel's position might be well taken if this young man Idaho Davis were the one that was injured, because he said he was unloading salt.

The Court: Let's look at this language now, Mr. McKevitt: "That the defendant, its agents and servants"—I am reading 5 now—— [1000]

Mr. McKevitt: 5 of the statement, your Honor?

The Court: Yes, it is arabic numeral 5 of the VII contention on Page 3: "That the defendant, its agents and servants in charge of said switching operations which resulted in said cars being switched

against those being iced”—when you are carrying salt out of a car, it isn't being iced, certainly—“and on which the said Gerald Stintzi was working”—he wasn't working on any car—“negligently moved said engine and said train and said cars involved at an excessive and dangerous rate of speed under the circumstances obtaining.” I don't think there is any evidence of an excessive or dangerous rate of speed here. The speed has been given, but there has been no evidence that that is contrary to safe switching operations.

Mr. Etter: I think that that is probably true. Your Honor, as to the carrying on of any icing operation or the cars being iced, I will concede that. I think, however, that the allegation, so far as it indicates that they switched cars against cars that were adjacent to and next to the loading dock, I think that your Honor's instructions or statement of the issue, in other words, should tailor it down to that fashion, I don't think it should eliminate that there was a switching against cars or there was a switching movement when there weren't any cars at all out there for any purpose. [1001]

Mr. McKevitt: I don't know what subdivision you are referring to Mr. Etter.

The Court: It is admitted, it is undisputed that there were cars there. If there weren't cars there, the boy wouldn't have gotten hurt, I assume.

Mr. MacGillivray: Your Honor is referring to subdivision 5?

The Court: 5, yes.

Mr. MacGillivray: Well, would that not be

amended to conform to the proof to read as follows: "Cars being switched against those around and about which the said Gerald Stintzi was working?"

The Court: But your allegation of negligence there is excessive and dangerous rate of speed, whatever your preliminary might be.

Mr. MacGillivray: That should be stricken.

The Court: Yes, that is all the negligence you allege in that paragraph.

Mr. Etter: That is correct.

Mr. MacGillivray: That is correct.

The Court: Is excessive and dangerous rate of speed.

Mr. McKevitt: Do I understand your Honor correctly that there is no allegation in 5 that—yes, I notice, "That the defendant, its agents and servants in charge of said switching operations which resulted in said cars being [1002] switched against those being iced and on which the said Gerald Stintzi was working." Now that could only refer to cars being iced, and if that goes out, the excessive speed goes out, of course, if that is true, the whole thing goes out.

The Court: I am taking out all of 5.

Mr. McKevitt: Mr. MacGillivray is talking about some sort of amendment to that.

The Court: No, I think I will just take that out. Do you have any other motions?

Mr. McKevitt: I think in view of your Honor's removing that allegation, that that takes with it the allegation of being engaged in icing operations no

matter where it is found in the statement of issues.

Mr. Etter: No.

Mr. McKevitt: Who, Stintzi?

Mr. Etter: That is correct.

The Court: I am just taking out that one allegation. Of course, we want to remember that these things are not proof, they are merely what they claim, and they are not entitled to a verdict unless they sustain them. Of course, the only reason I would take them out would be if there is no evidence to sustain an allegation, and I don't think I should be too exacting about that. They have a right to present their contentions here if there is anything [1003] to support them at all.

Mr. McKevitt: Well, then, as I understand it, your Honor thinks the only portion of the statement of issues that should be subject to motion is Subdivision 5 of the general Paragraph Seventh of the statement of issues? Am I correct in that?

The Court: That is the only one where I see that mention of working on cars being iced or icing. Let's see——

Mr. McKevitt: Right in the Fourth Paragraph on the first page: "On and prior to July 17, 1952, the minor plaintiff was employed by the Addison Miller Company and was engaged as a laborer in the performance of said car icing operations."

The Court: Where do you see that?

Mr. Etter: It is on Fourth.

Mr. McKevitt: No. 4.

The Court: I am not going to send this pleading to the jury and I am not going to read the whole

complaint or the whole statement; I am going to simply tell them that the plaintiff claims that the defendant was negligent in the following particulars and confine it to No. 7.

Mr. McKevitt: No. 7?

The Court: I don't think I need give them all of the pleadings here. I can rely on you gentlemen—

Mr. McKevitt: With that understanding, that you are confining it to 7, if that the allegation that we rise or fall on, why that is okay.

The Court: As I understand it, there aren't any jurisdictional issues here or other issues. All that I have in mind is to tell them that the plaintiff claims that the defendant was negligent in the following particulars; the defendant claims that Gerald Stintzi was contributorily negligent in the following particulars; and that the burden is on so and so, the one asserting negligence or contributory negligence.

Now I think on No. 6, I have grave doubts about this part—have you got 6 there in mind?

Mr. Etter: Sixth Contention?

The Court: Arabic No. 6 on Page 3, yes, of the contentions of negligence.

Mr. McKevitt: Yes, "had full knowledge."

The Court: "That at all times herein mentioned, the defendant, its agents, servants and employees," and I think this should be deleted: "had full knowledge and notice, or in the exercise of ordinary care should have had full knowledge and notice." I don't remember any evidence at all that they had actual knowledge.

Mr. Etter: As I gather it, your Honor, you intend to eliminate "had full knowledge and notice," but to leave [1005] "in the exercise of ordinary care should have known?"

The Court: "Should have known."

Mr. McKevitt: Oh.

Mr. Etter: All right, correct.

Mr. McKevitt: Well, so the record may be complete, may I have it show that my motion is directed toward that paragraph?

The Court: You wish to have it all deleted?

Mr. McKevitt: Yes.

The Court: Yes, I see, all right.

Mr. McKevitt: My reason for that being that even though they had knowledge that the workmen were working in and around cars, they had no knowledge that they were crawling under couplers or between cars and dumping ice in buckets.

The Court: Well, if you got it down that fine, then your motion for directed verdict should be granted.

Mr. McKevitt: Well, I think it should.

Mr. Cashatt: I agree.

Mr. Etter: The company itself and practically every representative knew all about taking sacks over there. I don't know whether they imply they carried them and threw them over the top of the boxcar.

The Court: I might say here, before we call the jury in, I wish to take up these proposed instructions, [1006] and while this isn't too complicated a case, it is a difficult one to instruct the jury on

because I don't send the copies of my instructions with them to the jury room and it is expecting a great deal of them to understand and apply these rules of law which I have to give.

But I think that, looking at it broadly here, and it may assist you somewhat in understanding my position on these proposed instructions, I assume that the relationship, while I haven't had time to examine it and counsel hasn't stressed it either to me or to the jury, I assume that this contract fixes the relationship and the relative rights and duties of the Northern Pacific Railroad Company and Addison Miller with respect to the operation of this icing of cars on the defendant's premises. I assume also that that contract shows that Addison Miller is an independent contractor and not an agent of the railroad company.

Mr. McKevitt: That's right.

The Court: I assume also that the contract doesn't specifically, at least, physically limit the area in which the operations of Addison Miller are to be conducted.

Mr. Cashatt: On that point, your Honor, I would say that it does, because there is a map attached to the exhibit which is outlined in red and referred to as the exact area, the dock itself, the tunnel and the plant.

The Court: What do you have in mind here?

Mr. Cashatt: I have this, your Honor—may I approach the bench?

The Court: Yes.

Mr. Cashatt: This is the area indicated and is referred to in the agreement, your Honor.

The Court: Well, what I have in mind, there isn't anything, at least there is no express language in this contract, which says that Addison Miller may not cross Track 13 or dump its salt sacks to the north of Track 13 or dump its slush ice there.

Mr. Etter: Or carry sacks of salt out of boxcars on the track.

The Court: Yes, or to cross the tracks carrying salt out of boxcars. And I should think that your arrangement there would give Addison Miller the right to operate and put its employees anywhere that is reasonably necessary within the contemplation of both parties to carry out the contemplated operation. Now we are getting on the borderline here when we cross Track 13, and there I think that is a question for the jury. That is my theory of it. The only question for the jury is whether or not under this conflicting evidence, at least conflicting to the extent that different inferences may reasonably be drawn, it is for them to determine whether or not in crossing the track and dumping the slush ice over on the north of Track 13, [1008] Gerald Stintzi was an invitee or a mere licensee or trespasser, and I think that that is a question that I have to submit to the jury.

Mr. McKevitt: You mean his legal status is a mixed question of law and fact as the record now stands?

The Court: Yes, I do, and I think it is to be submitted to the jury under an instruction giving

them the definitions of what constitutes his status in each of those, and in that respect I am going to use a lazy method here and read Judge Steinert's definitions of those three things as set out in Schock vs. Ringling Bros., 5 Washington (2), 599. It is the same definition he gives in the 16 Washington case that you cited here.

Mr. McKevitt: Yes.

The Court: 16 Washington (2).

Mr. McKevitt: I think your Honor was on the Supreme Court in the Ringling Bros. case, were you not?

The Court: Yes, but it is Judge Steinert's definition.

Mr. McKevitt: In which your Honor concurred.

The Court: Better than mine. But, at any rate, my theory is that that is a rather close question, I think here, for the jury to determine. As we all know, of course, the only duty that an owner and occupier of land owes to one who is a licensee or trespasser is to refrain from wilful [1009] and wanton injury, and there isn't any substantial evidence of wilful or wanton injury inflicted upon the minor by the railroad company. So I think in order to recover, it is necessary for the plaintiff to show that Gerald Stintzi was an invitee, and if he were in one of the other status, the verdict would have to be for the defendant.

I might say, in the discussion of these instructions, I am going to ask the reporter to stop taking this. It is really an informal recess, I could call you in chambers, but it will save time and be

easier to sit here and do it, and if I went in my chambers, he wouldn't, so I will just take an informal recess here until we have finished discussing these instructions. It is a long, hard day for the reporter and I wish to spare him as much as I can.

(Whereupon, the Court advised counsel for the respective parties of the action taken with respect to their requested instructions, after which the following proceedings were had out of the presence of the jury:)

The Court: I am going to take a 10 minute recess and then you can start the plaintiff's argument here. I think we ought to use the rest of our time until six, because it is going to be a graveyard shift for all of us, anyway. [1010]

Mr. McKevitt: In other words, we are going to eat before all the arguments are finished?

The Court: Oh, yes, I'm going to send the jury out to have dinner at 6 o'clock and then have them brought back at 7:30.

Recess for five minutes.

(Whereupon, a short recess was taken, after which the following proceedings were had in the absence of the jury:)

The Court: There is one thing that I neglected to mention before the recess, and that is that I have no objection to your stating what in substance you think the Court will instruct on a certain point, but I wish you wouldn't read the instructions which you proposed because I might change the language, you know. The Court always is flexible in its instructions until the last minute. And, also, if you

read them, it makes it necessary for me to explain to the jury that you haven't got a key to the back door of my chambers, it is one that you wrote yourself that I adopted. So I would rather you wouldn't read the instructions, but you may say what you think in substance I will instruct.

Bring them in. [1011]

(Whereupon, oral argument was made to the jury by counsel for the respective parties, concluding at 10:05 p.m. After a short recess, the following proceedings were had:)

Instructions of the Court

The Court: Ladies and gentlemen of the jury: This has been a long and fatiguing day for all of us. I feel that I owe you an apology for keeping you in session at this late hour. I very rarely have night sessions, have them only in cases of what I think are emergencies, and I really think that this is one.

I had hoped that this trial might be concluded in four days, but it turned out that that was not possible. Nobody is to blame for it, it is just that it was a trial in which there was a lot of evidence and a lot of contested issues, and we weren't able to finish within the time allotted. We are on the eve of the Fourth of July holiday, and my commitments are such that if I do not conclude this case now, I would have to set it over until the middle of August, and that, of course, would not be practical for all of you to go home and forget

all about this testimony and come back and try to decide this case in August.

So that we are in a situation where I feel it is unavoidable to have this long night session and to submit [1012] this case to you for your consideration at this late and inconvenient hour.

Now I think even though it is late and I have no disposition to take any more time than is necessary, it might be helpful to you if I explain how a judge formulates his instructions in a civil case in a Federal Court such as this.

The issues are made up of the pleadings and the evidence comes in and the judge pays close attention to it, just as you do and just as the attorneys do. At the conclusion of the case, the attorneys on both sides have the privilege of submitting to me written instructions which they think state the law on issues which they deem important. I take those proposals or requested instructions which they hand to me and I not only look them over carefully, but I discuss them with the attorneys, and it is my duty under the rules to tell them what my disposition will be of their requests, whether I will give their requested instructions or not.

Now that is the reason that you sat out there for, I don't know, 40 minutes, perhaps an hour, from the time the testimony concluded until we came in and started the argument. I was at that time going over these written proposals that the attorneys had submitted to me, discussing them with them and telling them what my action would [1013] be. So that when counsel tells you what he thinks the Court

will instruct, it isn't that he has any key to the back door of the judge's chambers or has any special way of getting knowledge; I tell them what I am going to do with their proposals in open court; and that is the reason counsel are able to accurately predict what the Court is going to instruct so far as the law is concerned.

However, the written proposals, I do not take them as written, I modify them, I change them, sometimes I put in instructions of my own, and part of my instructions will be, as you will see, extemporaneous, as this instruction to you is now. On the more important issues, while I know it is difficult to follow written instructions that are read, it would be much easier for you to follow and for me to do if I could just talk to you as I am now, nevertheless the issues in a case such as this involve very difficult and technical rules of law, and I feel for the sake of accuracy and in order that I may not misstate or overlook something, that it is wise that I read you written instructions on these important issues.

Now, there is a very definite division of authority, responsibility, and function in a civil case between the Court, that is to say the judge, and the jury. I am responsible for questions of law; you are solely responsible for questions of fact. It is your duty to find the facts [1014] in the light of the instructions which I shall give you as to the law, and it is your duty to take my instructions on the law as correct and to follow them.

Now, in the first place, I will just read to you

briefly what it is that the plaintiff contends in this case entitles her to recovery for the injuries sustained by her minor son, Gerald Stintzi. The claims are based upon alleged negligence of the defendant Northern Pacific Railway Company:

“(1) That the defendant, its agents and servants, negligently failed to keep a proper lookout and to use proper care for the safety of the said Gerald Stintzi while he was in the performance of his duties;

(2) That the defendant, its agents and servants, negligently failed to give the said Gerald Stintzi any notice or warning that any railroad cars were to be moved and shoved onto and against the railway cars about which the said Gerald Stintzi was working;

(3) That the defendant, its agents and servants, negligently moved and switched railway cars onto, over and against the said line of cars about which Gerald Stintzi was working; [1015]

(4) That the defendant, its agents and servants, in charge of its switching operations, negligently moved, operated and controlled said switching operations and the cars involved therein;

(5) That at all times herein mentioned, the defendant, its agents, servants and employees, in the exercise of ordinary care, should have had full notice and knowledge that the said Gerald Stintzi and/or other persons employed by other parties and by Addison Miller would be working on or about said railway cars spotted beside the defendant's loading dock; but that notwithstanding its said con-

structive knowledge and notice, the defendant, its agents, employees and servants, negligently caused the said cars to be switched, moved, or pushed onto and against the said stationary cars spotted and standing on the track adjacent to the defendant's loading dock and where said Addison Miller Company was carrying on its icing operations, without notice or warning of any kind; and

(6) That defendant, its agents, employees [1016] and servants, in charge of said train and cars which were switched negligently, moved the same without keeping the same under reasonable and proper control at all times."

Now the issues are made up by the defendant's denial of each and every one of these claimed grounds of negligence, and also these affirmative defenses or assertions on the part of the defendant, that Gerald Stintzi was himself guilty of negligence which contributed to his injuries and assumed the risk in these respects, namely:

"That he voluntarily placed himself on the defendant's trackage and between two of the cars on said trackage at a time when he knew or should have known that said cars were liable to be moved by defendant, and that he was exposing himself to great danger;

That the said Gerald Stintzi voluntarily entered a place of great danger between two of the cars standing on defendant's trackage in its yards without making any effort whatsoever before doing so to determine whether or not there was any likelihood that such cars might be moved."

Now the plaintiff has the burden of proving by a fair preponderance of the evidence the claims or contentions [1017] or allegations of negligence which I have read to you, and the defendant has the burden of proving the claimed grounds of contributory negligence on the part of the minor Gerald Stintzi.

Now in giving you these instructions and rules of law, which I hope will be of some help to you in determining these issues between the parties, I want you to bear in mind that in a lawsuit each party has its contentions and there are conflicts in the testimony because the contentions are supported by some evidence on the part of the plaintiff, we'll say, that is contradicted or partially contradicted by evidence on the part of the defendant, so we have these two versions in many respects of the lawsuit and of the claims and contentions of the parties. And it is the duty of the Court to give you instructions of the law as to what you shall do in case you adopt either the theory of the plaintiff or of the defendant. I am not the one to decide the facts; you are the ones to decide; so I tell you, in effect, if you adopt the defendant's theory, then you do so and so; if you adopt the plaintiff's, then you do otherwise. So that many times I think it may seem to a jury that the Court is giving contradictory, confusing instructions, when that is not the case, if you follow and understand them as they are intended to be given.

Now, as I have told you, this being a civil [1018] action, a party having the burden must prove his

point by a fair preponderance of the evidence, and the expression "fair preponderance of the evidence" means the greater convincing force or weight of the evidence. It means that which appears to be the more reasonable and more probable happening or event. It does not necessarily mean the greater number of witnesses testifying for or against a given proposition or claimed fact or series of facts, nor does it make any difference on which side the evidence is offered. It means, taking all the evidence on a particular issue into consideration, no matter which side may have offered it, that the convincing weight and force of the evidence is in favor of one side and against the other.

Now the basis of this action of the plaintiff is negligence, and negligence is the failure to exercise reasonable and ordinary care. By the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances and conditions. Negligence may consist in the doing of some act which a reasonably prudent person would not do, or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is the want of due care or ordinary care in the particular situation presented. "Due care" and [1019] "negligence" are relative terms and what in one situation might be due care might be negligence in another. So that the measure of duty is always reas-

onable care and caution under the particular circumstances with which we are dealing.

Now the mere fact that an accident happened in this case raises no presumption or inference of negligence on the part of the defendant railroad company. The defendant is not the insurer of the safety of Gerald Stintzi. Negligence is never presumed, but must be established, like any other fact, by a preponderance of the evidence, as I have just defined that term to you.

Now at the outset, I think I should say that in arriving at your verdict, you should not allow yourselves to be influenced or controlled by any consideration or feeling of passion, prejudice, or sympathy for or against either party to this action, nor should you be influenced or controlled in any way by the fact that the defendant is a corporation. It is your duty, and you are required under the law, to decide the case the same as if all the parties to the litigation were natural persons, for all parties to an action are equal before the law and are entitled to equal justice.

It is not necessary that the plaintiff prove the defendant guilty of each separate charge of negligence [1020] alleged in his complaint, but it will be sufficient to entitle plaintiff to recover if you find from a fair preponderance of all the evidence that the defendant was guilty of any one of such acts of negligence and that the same was a proximate cause of the injuries sustained.

Now I might say, for the sake of convenience, I will use the terms throughout, "guilty of negli-

gence” or “guilty of contributory negligence.” It is simply a convenient way of saying it, if you find there was contributory negligence or there was or was not negligence. The term “guilty” isn’t intended to connote any criminality or criminal responsibility.

Now this accident, as the proof shows here, occurred on the property of the defendant Northern Pacific Railway Company, and I might say that it is important at the outset, too, that there isn’t any question but what the injured boy, Gerald Stintzi, was not an employee of the Northern Pacific Railway Company. So I think it is important, and it may be helpful to you to decide, and you must decide from the evidence, just what was the relationship between the land owner, the Northern Pacific Railway Company, and Gerald Stintzi, at the time of his accident.

And under the evidence here, you may find that he was either an invitee, a licensee, or a trespasser, and I will define those terms for you in these words: [1021]

An “invitee” is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant of the premises is then engaged or which he permits to be conducted thereon, and to establish such relationship, there must be some real or supposed mutuality of interest in the subject to which the visitor’s business or purpose relates.

A “licensee” occupied an intermediate position

between that of an invitee and that of a trespasser. He is one who goes upon the premises of another either without an invitation, express or implied, or else for some purpose not connected with the business conducted on the land, but goes, nevertheless, with the permission or toleration of the owner.

And a "trespasser" is one who enters the premises of another without invitation or permission, express or implied, but who goes rather for his own purposes or convenience and not in the performance of a duty to the owner or one in possession of the premises.

Now under the law, the only duty which the defendant Northern Pacific Railway Company owed to Gerald Stintzi at the time of his injuries, if he was a mere licensee or trespasser, was not to wilfully or wantonly injure him, and I instruct you, as a matter of law, that [1022] there isn't any substantial evidence here of any willful or wanton injury of the minor Gerald Stintzi by the Northern Pacific Railway Company, so your first task is to determine whether or not Gerald Stintzi was an invitee, under these definitions which I have given you.

In this connection, you are instructed that Gerald Stintzi was an invitee at the time and place of his injury only if he was at said place, that is to say, between the freight cars in question, with the express or implied permission of the defendant Northern Pacific Railway Company, and for the purpose of performing some task connected with the business of the Northern Pacific Railway Company or

which the company permitted to be conducted thereon, and in order to constitute Gerald Stintzi an invitee under the law, it is not enough that he was between the freight cars with the express or implied permission of the Northern Pacific Railway Company; it is also necessary that there was some real or supposed mutuality of interest between Gerald Stintzi and the defendant in the subject to which the former's business or purpose related.

If you should find under this instruction that Gerald Stintzi was not an invitee, then you are instructed that he cannot recover in this action, as I have indicated, and your verdict should be for the defendant.

To further assist you in determining whether or [1023] not Gerald Stintzi was an invitee, you are instructed that even though he was on the premises of the Northern Pacific Railway Company by invitation, he would cease to be an invitee if he went to a place not covered by the invitation. Furthermore, it is the law that one who is on the premises of another by invitation ceases to be an invitee if he makes an unreasonable use of the premises or uses the premises in a more dangerous way than was reasonably contemplated by the invitation.

Under all the foregoing, it is for you to determine whether Gerald Stintzi was an invitee of the defendant Northern Pacific Railway Company at the time and place of his injury, that is, in going between and underneath the couplings of the freight cars in question. If you find that he was an invitee,

then you should proceed to determine whether the Northern Pacific Railway Company was negligent and whether Gerald Stintzi himself was contributorily negligent under the other instructions which I shall hereinafter give you. On the other hand, if you find that he was not an invitee, then, without more, your verdict should be for the defendant.

Now if you find under the instructions already given that Gerald Stintzi was an invitee of the defendant at the place of his injury, then you should next proceed to determine whether the defendant Northern Pacific Railway [1024] Company was guilty of any negligence which was the proximate cause of his injury. In this connection, I charge you that in order to find the defendant railway company negligent in this case, you must find from the preponderance of the evidence, that when the defendant, through its agents and employees, shunted freight cars onto Track 13 and caused them to drift into and against the freight cars between which Gerald Stintzi was located, the defendant, through its agents and employees, knew or should have known, in the exercise of reasonable care, that the employees of Addison Miller Company were engaged in work of such nature that they would be endangered by the movement of the cars. If you should find that the railway company, through its agents and employees, knew or should have known at the time that Addison Miller employees were engaged in work which would cause them to be endangered by the movement of the cars, then the defendant was negligent, and if you further find that

such negligence was a proximate cause of the injuries to Gerald Stintzi, and that Gerald Stintzi himself was not guilty of contributory negligence, your verdict should be for the plaintiff.

On the other hand, if you should find that the defendant railway company, through its agents and employees, at the time it shunted the cars into and against the cars on Track 13 between which Gerald Stintzi was located had no [1025] knowledge or reasonable cause to believe that the employees of Addison Miller Company were so engaged as to be endangered by the movement of the cars, then the Northern Pacific Railway Company was not negligent in moving the cars and your verdict should be for the defendant.

Now if you find under the other instructions that I have given you that Gerald Stintzi was an invitee at the place of his injury, and that the Northern Pacific Railway Company was guilty of negligence which was the proximate cause of his injury, then you should proceed to determine whether or not Gerald Stintzi was himself guilty of negligence which proximately contributed to his injury. In this connection, you are instructed that contributory negligence of a plaintiff, when established, is a complete defense to an action of this type. No matter how negligent the defendant Northern Pacific Railway Company may have been, if Gerald Stintzi was himself guilty of some negligence which proximately and materially contributed to the occurrence of the injury, he cannot recover.

A person is guilty of contributory negligence if

he fails to exercise the care which an ordinarily prudent person would use under the same or similar circumstances and his failure proximately and materially contributes to the occurrence of his injury. Ordinary prudence or reasonable care requires that a person in possession of his [1026] faculties exercise reasonable care for his own safety. One may not cast the burden of his own protection upon another, but at all times owes himself the duty of self-protection. The law will not permit one to close his eyes to danger and, if thereby injured, seek a remedy in damages against another. One is at all times bound to use his intellect, senses and faculties for his own protection.

Therefore, if you should find from a preponderance of the evidence that Gerald Stintzi, in going between the freight cars in question and beneath the couplings, failed to exercise reasonable care for his own protection, and that such failure proximately contributed to his injuries, then Gerald Stintzi was guilty of contributory negligence and cannot recover in this action and your verdict should be for the defendant, notwithstanding that you may also find that the defendant was guilty of negligence.

On the other hand, if you should find that Gerald Stintzi was an invitee and that the defendant was guilty of negligence which was the proximate cause of his injury, a proximate cause of his injury, and you should further find that Gerald Stintzi was not contributorily negligent, your verdict should be for the plaintiff.

Now the fact, if it be a fact, that Gerald Stintzi, in going between defendant's freight cars and under the couplings thereof, was attempting to carry out orders [1027] of his employer, Addison Miller Company, is not to be regarded by you as an excuse for conduct on his part which could otherwise be contributory negligence. Even though he was directed by his superiors to do the very thing that he was doing when injured, he would still be contributorily negligent if you should find that a reasonably prudent person, acting under the same or similar circumstances, would not have gone between the freight cars in question or under the couplings thereof.

Now I instruct you, as a matter of law, that Addison Miller Company in its relation to the defendant Northern Pacific Railway Company was an independent contractor and not an agent. It follows, therefore, that any negligence on the part of Addison Miller Company or on the part of its foreman in directing plaintiff to cross the track in question or in failing to take precautions to protect plaintiff while he was doing so, cannot be considered by you as any negligence on the part of the Northern Pacific Railway Company. The defendant in this case, Northern Pacific Railway Company, is in no way chargeable with or responsible for any negligence on the part of Addison Miller or its foreman which may have caused or contributed to plaintiff's injury.

If you should find that the sole cause of plaintiff's injury was negligence on the part of Addison [1028] Miller Company or its foreman, or that the

sole cause of plaintiff's injury was the concurrent negligence of plaintiff himself and Addison Miller Company or its foreman, then your verdict should be for the defendant.

However, if you find that Gerald Stintzi's injury was proximately caused by the concurring negligence of both Addison Miller Company and the defendant railway company, and you do not find that Gerald Stintzi was guilty of any contributory negligence which proximately contributed to his own injury, then your verdict should be for the plaintiff.

There is evidence here that there was an arrangement, understand, or practice between Addison Miller Company and the defendant Northern Pacific Railway Company that when employees of the former were engaged in icing cars along the icing dock, the Addison Miller foreman would turn on a blue light on either end of the dock as a warning to the railway company employees that the cars along the dock were not to be disturbed. The undisputed evidence, moreover, is that at the time of the accident no blue light was burning on the icing dock. There is also in evidence Rule 805 of the Consolidated Code of Operating Rules, which reads in part as follows:

"Before moving cars or engines in a street or on a station or yard track, it must be known that they can be [1029] moved with safety. Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone."

In this connection, I instruct you that the defendant Northern Pacific Railway Company was required to exercise due care in the movement of its cars, notwithstanding the fact that it had this arrangement which I have described with Addison Miller Company with reference to the blue light and that no blue light was shown or burning on the icing dock at the time of the accident. If defendant Northern Pacific Railway Company had any reason to anticipate that persons might lawfully be employed in, on, under, or about standing cars, it was under a duty reasonably to warn such persons of any movement of the cars which might endanger them.

If you find that Addison Miller, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi in failing to provide a blue light for his protection on the icing dock, and if you further find that the defendant Northern Pacific Railway Company was also guilty of negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which contributed proximately in any measure to the injuries sustained by Gerald Stintzi, [1030] you are instructed that the negligence of Addison Miller cannot be imputed to Gerald Stintzi and Gerald Stintzi is not liable for such employer's negligence, and you will therefore disregard any evidence of negligence of Gerald Stintzi's employer and return your verdict for the plaintiff against the defendant Northern Pacific Railway Company, unless you should further find

from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto.

Now when a railroad company knows or, under the circumstances existing, should have known or anticipated that a person is or might be working on or about a standing railway car, it owes a duty to keep a proper lookout for such person when operating or moving trains or cars and to give a reasonable and timely warning to such person of its intention to operate or move trains or cars in the vicinity or of its intention to move or interfere with the car or cars on or about which the person is or might be working where injury to such person is likely to occur. Failure to maintain a lookout or to give due warning under such circumstances constitutes negligence. If, therefore, you should find from the evidence in this case that Gerald Stintzi was an invitee at the time of his injury, as I have defined the term "invitee" for you, and that the defendant [1031] railway company, through its employees, knew or under the circumstances existing should have known or anticipated that employees of the Addison Miller Company were or might be present and working on and about the icing dock and the railway cars on the tracks immediately adjacent thereto, then I instruct you that it was the positive duty of the railway company to give reasonable and timely warning to such employees of impending movement of cars on such tracks. Failure on the part of the defendant railway company

to give such reasonable and timely warning, under the circumstances outlined, would constitute negligence on the part of the defendant railway company.

Now, ladies and gentlemen, you are the sole judges of the credibility of the witnesses and the weight which is to be given to their testimony. A witness is presumed to speak the truth. but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. The jurors should carefully scrutinize the testimony, the circumstances under which each witness testified, and every matter and evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive, state of mind, and demeanor and manner while on the stand. Consider, also, any relation which each witness may bear to either side of the case, the [1032] manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

A witness may be discredited or impeached in several ways, as by contradictory evidence, by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. Now if the jury believes that any witness has been impeached or thus discredited, it is the jury's exclusive province to give the testimony of that witness such credibility, if any, as they think it may deserve. Inconsistencies or dis-

crepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit the testimony. Two or three or more persons witnessing an incident or transaction may see or hear it differently, and innocent misrecollection like failure to recollect is not an uncommon occurrence. In weighing a discrepancy, the jury should consider whether it pertains to an important or unimportant detail or whether or not the discrepancy involves a material issue in the case. If a witness is shown knowingly to have testified falsely concerning any material matter, the jury has the right to distrust such witness' testimony in other particulars and may reject all the testimony of that witness or give it such credit as they may think it deserves. [1033]

Now from time to time the attorneys for one or the other of the parties have interposed objections to evidence. Counsel not only have the right but the duty to make any and all objections which they may deem advisable or appropriate, and no inference or presumption should be indulged in one way or the other by reason of the making of any objections.

Now you have observed also that at times throughout the trial I have been called upon to pass on the question of whether certain offered evidence should be admitted. You are not to be concerned with the reason for such rulings and are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law with which the jury is not concerned. As to any offer of evi-

dence that was rejected, you should not consider the same. You will not consider any evidence that was ordered stricken from the record by the Court, and as to any question to which an objection was sustained, you should not conjecture as to what the answer might have been or the reason why the objection was made.

If I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either the plaintiff or the defendant in this case, you are not to be influenced by any such suggestion. I have tried to be strictly impartial, and if any action [1034] or expression of mine has seemed to indicate the contrary, you are instructed to entirely disregard it.

If I have made any comment on the evidence—I think I have made some in these instructions—but if I did in either these instructions or otherwise in the course of the trial, you may consider, but you are not bound by any such comment. It is your duty to follow my instructions as to the law, but finding the facts is your sole function and responsibility.

Now you should not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts.

Now, members of the jury, I am going to give you some instructions as to the measure of damages in case you should find for and return a verdict for the plaintiff. You will understand, of course, that my giving you these instructions is not intended as

any indication on my part of what I think your verdict should be. I am simply giving you these instructions if you find for the plaintiff, then you shall award damages as follows:

You will ascertain and award such amount in damages, not exceeding \$260,845.86, as will fairly and reasonably compensate Gerald Stintzi for such personal injuries as you may find from a preponderance of the evidence [1035] he has sustained.

In arriving at such damages for personal injuries, you may and should take into consideration the nature and extent of his injuries which you find from a preponderance of the evidence that Gerald Stintzi sustained; the pain, suffering and discomfort, both mental and physical, he has endured on account of such injuries; and the pain, suffering and discomfort, both mental and physical, he will with reasonable certainty endure in the future on account of such injuries. You should also take into account such suffering, discomfort, humiliation and embarrassment that he has suffered from his disfigurement and will with reasonable certainty suffer and endure in the future, and you should consider further whether or not his injuries are permanent in character and whether or not they will with reasonable certainty prevent him in the future from engaging in a gainful occupation and whether such injuries will reasonably require future personal care and medical treatment; and you should consider all of these elements and the further element of Gerald Stintzi's loss of function as a result of the injuries sustained by him.

You should also allow to the plaintiff special

damages in such reasonable sum as you may find from the preponderance of the evidence will compensate Gerald Stintzi for hospital expenses, not exceeding the sum of [1036] \$6,678.98, not exceeding the sum of \$3,000.00 for medical and doctors expenses, and not exceeding the sum of \$2,164.00 as and for special nurses, not exceeding the sum of \$662.81 as and for necessary prosthetic devices. In no event shall your verdict for special damages exceed the sum of \$12,505.79.

Now in the event your verdict should be for the plaintiff, you are instructed that in arriving at your verdict, you are not permitted to add together different amounts representing the respective views of different jurors and to divide the total by 12 or by some other figure intended to represent the number of jurors involved. Any such figure would result in a quotient verdict and would be contrary to law and would be in violation of your oaths.

You are, of course, to give consideration to each other's views and reasoning and honestly endeavor to agree upon a verdict. But such common agreement is to be based upon the final honest belief of the jurors, and must not be arrived at by any mechanical process of addition and division, such as I have described, which would constitute a quotient verdict.

Now when you retire to the jury room to consider your verdict, you will take with you the exhibits which have been admitted in evidence in the case, and your first duty will be to elect a foreman. You will select some [1037] foreman who will act

as your chairman, in effect, and preside over your deliberations in the jury room and sign your verdict when you have agreed upon it.

Now for your convenience two forms of verdict have been prepared here, and you should have no trouble with them, they are very simple. They have the heading of the case, and one of them is: "We, the jury in the above-entitled cause, find for the defendant." The other one has the same heading and reads: "We, the jury in the above-entitled cause, find for the plaintiff and assess damages in the sum of dollar sign blank." You select the appropriate verdict, and when you have agreed upon it, the foreman will sign it. And in Federal Court, in this case, your verdict must be unanimous, that is to say, all 12 of your number must agree upon the verdict which you return. Now when you have reached an agreement, let the bailiff know and you will be brought into court to deliver your verdict in open court.

I will ask the jury to retire now while further proceedings are had in your absence.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: Counsel has just called my attention to the fact that I inadvertently overlooked his proposed 7, [1038] which embodies the stipulation as to the life expectancy. In some manner or other, I lost it in the shuffle, because this is the first time I have ever seen it, and in taking your exceptions here I will ask you to assume that I will give this one when the jury comes in. I will tell them I over-

looked it and they are not to place any special importance on it, but I will give it to them. In taking your exceptions, you may take an exception to that one, if you care to do so, to No. 7 proposed by the plaintiff.

Let's see, we will start with plaintiff's counsel here. Do you wish to state any exceptions to the Court's instructions? You may take exceptions now to the Court's instructions in the absence of the jury.

Mr. McKevitt: I would rather have them begin the frontal assault.

Mr. MacGillivray: Could we just have a second?

The Court: Yes. I don't think there is any particular order here that should be followed. If you are ready, Mr. McKevitt, you may state your exceptions, and then by that time perhaps the conference will be over between plaintiff's counsel.

Mr. McKevitt: They want me to insult you first.

The Court: All right.

Mr. McKevitt: I will proceed in the interest of time if they are not ready. [1039]

The Court: Are you ready?

Mr. MacGillivray: We know which one we think is bad. We haven't figured out the reasons yet why we think it is bad.

The Court: All right.

Mr. McKevitt: May I proceed, your Honor?

The Court: Yes.

Defendant's Exceptions to Instructions

Mr. McKevitt: The Court having instructed the

jury, and the jury at the time of the taking of these exceptions not having retired to consider of their verdict, the defendant Northern Pacific Railway Company takes the following exceptions to instructions given by the Court:

The defendant excepts to the failure of the Court in the statement of the issues to have recited that one of the defenses of the Northern Pacific Railway Company, as set forth in the statement of issues, was that the plaintiff Gerald Stintzi was a trespasser. I should qualify that by saying that, while we didn't label him as such, I think, Mr. Williams, is it correct that we did specifically recite in the statement of the issues that he had no right to be where he was, which I would take it would be tantamount to the same thing? [1040]

The Court: Did you say that as an affirmative defense?

Mr. McKevitt: No, in our statement of the issues.

The Court: I see.

Mr. McKevitt: Yes. Am I correct?

Mr. Williams: Yes.

Mr. McKevitt: In other words, as I recall, if your Honor please, in the recital of the issues and dealing with our affirmative defenses, you simply recited that we have pleaded as a defense, if I was able to take my notes accurately, that he was guilty of contributory negligence, and that the statement of the issues in that regard went no further.

I hope I am not mistaken in that, but that is my

recollection, not having had a copy of the instructions before me.

The Court: Yes, I thought I was giving your affirmative defenses here.

Mr. McKevitt: I may state that while you were giving the statement of the issues, I did refer to our affirmative defenses to the amended complaint and I couldn't find that we had specifically recited that he was a trespasser, and I so advised Mr. Williams, and he said, however, that in our statement of the issues we had referred not specifically to the fact he was a trespasser by so labeling him, [1041] but we did say he was in a place where he had no right to be at the time he was injured, and I think that would be tantamount to calling him a trespasser.

Have you got the particular portion?

Mr. Williams: We don't seem to have a copy of our statement of the issues here, your Honor.

Mr. McKevitt: I wish you would borrow one or get the original file. If we are incorrect in that assumption, I want to withdraw that exception, naturally.

Mr. Etter: Here is a copy of your statement of contentions.

Mr. McKevitt: That is yours?

Mr. Etter: That is mine, that is a statement of contentions. It is mine, but it isn't our contentions.

Mr. McKevitt: Let's see if we have it here.

Yes, Paragraph I, if your Honor pleases, of defendant's statement of contentions, reads as follows:

"That the duties of the plaintiff Gerald Stintzi,

in connection with his employment by Addison Miller Company, did not require him to work and be on, around or about railroad cars of the defendant except the top of such refrigerator cars as were from time to time being iced by Addison Miller Company, and the said Gerald Stintzi had [1042] no right to be elsewhere on, around or about railroad cars of the defendant in defendant's railroad yard at Yardley, Washington, and particularly had no right to be between or under any cars, refrigerator or otherwise, nor any right to be on any of the defendant's trackage."

The Court: Well, the awkward thing about that, Mr. McKevitt, is, if you wish me to, I will instruct that you have the burden of proving that he was a trespasser. I have instructed the jury that if they find he is a trespasser, they should find a verdict for the defendant, because I have assumed that it is the burden of the plaintiff to show that Gerald Stintzi was neither a trespasser nor a licensee, but was an invitee, and if they fail to prove that by a fair preponderance of the evidence, the verdict should be for the defendant. That has been my theory.

Now if you take the position that it is an affirmative defense and the burden was on you to prove he is a trespasser or a licensee, I will instruct them that, because I think that is favorable to the plaintiff.

Mr. McKevitt: If that is your Honor's viewpoint, I will press the proposition no further.

The Court: I did instruct them definitely that if

[1043] they find he is a trespasser, their verdict should be for the defendant.

Mr. McKevitt: The defendant excepts to that portion of the Court's instructions wherein the Court dealt with the effect of concurring negligence, for the reason and upon the ground that there is no proof of substantial character of any probative value that the railway company was guilty of actionable negligence which can be said to have been the proximate cause of the accident.

May I confer just one moment?

The Court: Yes.

Mr. McKevitt: The defendant further excepts to that portion of the Court's instructions which dealt with Rule 805, for the reason and upon the ground that during the course of the trial when plaintiff's counsel injected or attempted to inject a portion of that rule into the evidence, the defendant took the position that, first, there had been no pleading of a rule violation which could be said to have been the proximate cause of this man's injury, that is, no rule violation of the Northern Pacific; on the further ground that Rule 805, as it is now in the record, under any reasonable interpretation could not be held to have been a rule enacted for the benefit of Gerald Stintzi, and particularly for his benefit when it is considered the nature of the work that he was doing at that time.

The defendant excepts to that portion of the Court's instructions which inform the jury that if the defendant had knowledge of or should have anticipated the presence of any of the Addison Miller

employees on or about the dock, that they would be guilty of negligence if they didn't exercise due care. The basis for this exception is that under the evidence in this case, no matter what the duty of the railway company was to Addison Miller employees engaged in icing cars or dealing with salt cars which required them to be in and around or about the cars, that duty did not encompass any duty on the part of the defendant railway company to anticipate that this minor would be engaged in the operation of transporting ice under or over or between cars or under or over couplers of connected cars.

The defendant excepts to the failure of the Court to give Defendant's Requested Instruction No. 3. This exceptions is taken only to the refusal of the Court to give the third paragraph of said instruction, which reads as follows:

"You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous [1045] method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger. Therefore, if you should find from a preponderance of the evidence that Gerald Stintzi, in going between the freight cars in question and beneath the couplings, failed to exercise reasonable care for his own protection——"

The Court: Pardon me, I think you have gotten into what I did read there.

Mr. McKevitt: Oh, maybe I have.

The Court: "Into a position of danger," that is the end of the paragraph.

Mr. McKevitt: Oh, yes, that is a portion——

The Court: I did read that.

Mr. McKevitt: (To the reporter): Will you correct that, Don?

The Court: You have in mind the paragraph that I omitted.

Mr. McKevitt: Yes. The basis of the exception, if your Honor pleases, in that regard is this: That he was, in carrying out the orders of the foreman to dump this ice [1046] north of Track 13, not exclusively confined to the proposition that he had to carry out that order by crawling between cars, because the evidence here shows that he could have walked to the east a distance of not to exceed three cars, or 120 some odd feet, where he could have crossed over the track.

And your Honor will recall that in Mr. MacGillivray's argument, if my recollection is not faulty, that he emphasized to the jury that we might make contention with reference to the procedure that he adopted and contend that he should have gone around these cars, and stated to them that even though he had done so, that if the cars were bumped into, he would have been injured anyway.

And then the further showing is that the ice could have been dumped at some point west of the door leading from the slush pit and without any neces-

sity of going between the cars, or it could have been dumped under the dock, or it could have been dumped between the dock and the track, so he selected, in our opinion, the most dangerous method of all the methods that were open to him.

The defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 5 in the language requested by virtue of the fact that the instruction that was requested was qualified by an additional paragraph which dealt, if my memory serves me correctly, with [1047] concurring negligence.

The Court: That's right.

Mr. McKevitt: In other words, it made it an alternative proposition, and our contention is that there was no evidence of concurring negligence.

The defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 6.

Before I follow with that request, might I discuss that proposed exception with counsel?

The Court: All right.

Mr. McKevitt: Defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 6, for the reason and upon the ground that the jury should have been told that if they found from a preponderance of the evidence that there were no cars being iced on Track 13, nor any car or cars on Track 13 from which salt was being unloaded by Addison Miller employees during the time that he was crossing between cars, crossing Track 13 between and underneath the couplings of the cars, that they must find for the defendant.

We thought or feel, your Honor, that we are entitled to have an instruction specifically on that point, because the manner in which the situation was covered was too broad in that it permitted the jury to speculate or to conjecture or to find from the evidence that the company [1048] could have been negligent if men were working in or around these cars generally, and your Honor knows the emphasis that was placed by the plaintiff in this case upon the presence of a salt car on that track, and we think that the jury, under the law as heretofore presented, should have been instructed, and under the pleadings, that they must find that he was either doing one or two things or both things intermittently, either icing cars or engaged in salt operations, and if he was doing neither of those things, then he was not in the course of his employment to the extent that he was an invitee upon the tracks.

Mr. Williams: May I supplement that, your Honor?

The Court: Yes.

Mr. Williams: Our theory as to Instruction No. 6, why it should have been given by the Court, is that actually that is the real issue in this case insofar as contributory negligence of the plaintiff Gerald Stintzi is concerned. It is our position in requesting that instruction that that gets to the meat of it and that in that way only can the jury intelligently pass upon the question as to whether Gerald Stintzi was guilty of contributory negligence, because it is our position that if there was no salt

car being unloaded on that track at that time or any cars being iced, then Gerald Stintzi was guilty of contributory negligence as a matter of law, and that is the only thing that could [1049] excuse him from being contributorily negligent as a matter of law, the fact that there were cars, if there were, being unloaded on that track, and that that being the real issue, it seems to us that that is the way that the issue of contributory negligence should have been presented to the jury.

Mr. McKevitt: The defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 7. That instruction was to the effect that the Northern Pacific Railway Company was not required to anticipate that any employee of Addison Miller would be engaged in removing ice from the slush pit or engaged in carrying that ice across Track 13 by means of crawling over or under the couplings of any freight cars that were standing on that track. And the instruction in that regard, insofar as the plaintiff was concerned, was proper because it recited, in effect, that if we knew or in the exercise of care should have known that this was a common practice on the part of Addison Miller, if we had actual or constructive notice of such procedure, then we could not avail ourselves of the lack-of-knowledge proposition.

The defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 9. That instruction dealt with the proposition that it was the duty of Addison Miller to provide its em-

ployees with safe working areas, including Gerald Stintzi, and dealt with the [1050] proposition that we had a right to assume that Addison Miller was performing its duty towards its employees, and that unless the Northern Pacific had knowledge or knew or in the exercise of reasonable care should have known to the contrary, namely, that the Addison Miller Company wasn't performing its duties, then the jury should have been so informed. In other words, that instruction placed upon Addison Miller the duty of giving proper safety instructions to its own employees. The evidence here from some of these boys is that they had no knowledge of a blue light rule, knew nothing about a rule of that character, which had been instituted or a practice adopted by the company, and so and so forth. And while your Honor did instruct the jury with reference to this practice of custom on the part of Addison Miller and Northern Pacific and its reasonableness, the instructions in no wise cover the duty of Addison Miller to have advised their own employees of that situation. In other words, if there had been a blue light up there and we—well, strike that, I am thinking ahead of myself.

The way I wanted to put that was this: Relevant to the duty of the Addison Miller to have so instructed them, these boys have been informed or these employees that blue lights would protect them against movements of trains onto that track when they were working on or under these cars, and that they didn't ascertain for themselves whether [1051] or not that blue light had been posted, and they

would be negligent, even though the foreman had failed to put the light up.

That is all I have.

Mr. Williams: Just a couple of other things, your Honor.

With reference to our Requested Instruction No. 9, our exception is also based upon our position that that is a correct statement of the law and was not otherwise covered in the instructions, and it was necessary in order to give the jury all of the law necessary to fix the responsibility.

The Court: Are you both taking exceptions to the same instructions?

Mr. Williams: I just wanted to add that.

The Court: I see. I think you should make only one exception to each instruction. After all, it is 11:20 here and we have a time limitation. I want you to make a good record, but——

Mr. McKevitt: That is the only one you are supplementing, isn't it?

Mr. Williams: I had one other I wanted to mention.

The Court: All right, go ahead.

Mr. Williams: With reference to, I believe, the first part of the first requested instruction of the [1052] plaintiff, that portion of it where your Honor instructed the jury as to concurrent negligence of Addison Miller and Northern Pacific Railway Company, a part of that instruction, it said that: "If you find that the defendant Northern Pacific Railway Company is also guilty of negligence in any degree which contributed proximately in any meas-

ure to the injuries sustained by Gerald Stintzi," etc., then they are entitled to recover against Northern Pacific Railway Company; the exception being that that permits the jury to find Northern Pacific Railway Company liable on a finding of slight negligence or of negligence which did not contribute materially to the injury; in other words, does not fix the standard of ordinary negligence upon which any liability of Northern Pacific Railway Company would have to be based.

The Court: What one are you referring to now?

Mr. Williams: It is the one on concurrent negligence. It was a part of the first requested instruction of the plaintiff. I don't know just where it is found in your Honor's instructions.

The Court: I think I can find it here, yes.

Mr. Williams: It was toward the last. It was right after that business about Rule 805, I believe.

The Court: You refer to the one that recites that if they find that the Northern Pacific Railway Company was [1053] also guilty of negligence in any degree or act or failure to act?

Mr. Williams: Yes, of the words "in any degree."

The Court: Or act as charged and claimed by the plaintiff, yes.

Mr. Williams: The words "in any measure," also.

The Court: Yes.

Mr. Williams: That was Plaintiff's Requested Instruction No. 2.

The Clerk: Yes.

Mr. Williams: And, further, we except to the reference in the instructions to Rule 805 of the Northern Pacific Railway Company, for the reason that so far as we can recall, Rule 805 was not introduced in evidence. There was some reference——

Mr. Cashatt: Yes.

Mr. Williams: I'm sorry.

The Court: I noticed at the time here, I didn't have time to go over these word for word, read them, and I noticed when I read this, I was a little puzzled by this statement, also, "in any degree." What did you have in mind in writing it that way, "in any degree," whoever wrote this for the plaintiff: "If you find that the Northern Pacific was also guilty or negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which [1054] contributed proximately," and so on?

Mr. MacGillivray: How does it continue on from there?

The Court: "If you find that the Northern Pacific Railway Company was also guilty of negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which contributed proximately and in any measure."

Mr. MacGillivray: The negligence would have to be under that next sentence there, have to contribute proximately to cause the injuries complained of. Your Honor, in another instruction, has also advised the jury that negligence, to be actionable, has to contribute or be a proximate cause of the injury.

The Court: I think so, yes. I think, taken as a whole, that is a rather small thing. I would word it differently if I were doing it again.

Go ahead, you may take your exceptions.

Plaintiff's Exceptions to Instructions

Mr. MacGillivray: Plaintiff excepts to the failure of the Court to give Plaintiff's Instruction No. 3, or Requested Instruction No. 3, which is an instruction reading:

"While engaged in the performance of his [1055] duties as an employee of the Addison Miller Company, the minor plaintiff Stintzi was an invitee on that part of the premises of the defendant railway company necessary to the performance of his duties as an employee, and to the minor plaintiff the defendant railway company owed the duty of maintaining in safe condition for his use that part of its premises necessary to the performance of the duties required of the minor plaintiff by the Addison Miller Company and further owed to him the duty of exercising reasonable care to avoid injuring him while he was engaged in the performance of such duties. Failure on the part of the defendant railway company to perform these duties owing to the minor plaintiff constitutes negligence."

My position is this, your Honor, that the evidence here is, we have the contract in evidence between Addison Miller and the Northern Pacific placing upon the Addison Miller Company under that contract the duty of performing the icing operations at the Yardley yards for and on behalf of the

Northern Pacific Railway Company. There is no [1056] determination in that contract as to just what part of the premises were necessary to the performance of those icing operations, no limitation in the contract as to what portion of the premises could and would be used by Addison Miller in the performance of those icing operations. The contract, in fact, has a provision in it that the icing operations of Addison Miller at the Yardley yards are to be conducted in accordance with rules and regulations adopted and promulgated by the Northern Pacific Railway Company itself.

Now the evidence we have here, your Honor, is that for ten years prior to July 17, 1952, the Addison Miller Company had continuously used—

The Court: Mr. MacGillivray, this isn't an opportunity for argument or re-argument as to whether the Court should give instructions; the sole purpose of this is to inform the Court what your objections are and to lay the foundation for an appeal to the Court of Appeals.

Mr. MacGillivray: That's right.

The Court: I don't wish to entertain re-argument as to why I should give this instruction.

Mr. MacGillivray: Yes, your Honor.

The Court: Or refuse to give it, I mean.

Mr. MacGillivray: Pointing out the evidence, your Honor, that it makes, to me, the objection applicable, and that is for ten years they had used the part north of Track [1057] 13 for the dumping of sacks and for the dumping of slush ice, and that under that evidence, that is the only evidence in

the record, most certainly that part of the premises was used as a necessary part of the premises to the performance of that part of these icing operations. And if the jury should find that that part of the premises was necessary, and it is the only finding that could properly be made because there is no evidence to the contrary, then as to that part of the premises, he was an invitee.

The question as to going through the two cars in question would not bear on whether he was an invitee in being on that track and crossing the track; that question, to me, would only have a bearing on whether in using that part of the premises necessary to the performance of his duties, he was using that part in a proper fashion and as a reasonably prudent person would have used it. And, in short, it goes only and simply to the question of contributory negligence.

And I think that the Instruction No. 3, had it been given, would have allowed the jury to find that while crossing Track 13 to the far side, and it had been used for ten years, he was an invitee on that portion of the premises. And the jury could find on other instructions given by your Honor that in using that part of the premises in the manner in which he used them, that is, by going through [1058] which he impliedly had been——

The Court: You are not greatly impressed by an expression of what the Court wishes you to do, are you, Mr. MacGillivray?

Mr. MacGillivray: I'm sorry, your Honor.

The Court: When I expressly ask you not to

read instructions to the jury, you got up there and started right out to read one, didn't you? Now I am asking you not to argue with me——

Mr. MacGillivray: I'm sorry.

The Court: State your reasons why this is an incorrect instruction for the record here and conclude with that.

Mr. MacGillivray: I have stated the reasons as to Instruction No. 3.

The Court: All right, go ahead now. The purpose of this is to give your reasons why you are excepting to my instructions or failure to give them, not an extended argument to me as to why I should change my mind. It is 11:30 at night, and I want to get this case to the jury.

Mr. MacGillivray: I'm sorry, your Honor.

Plaintiff excepts to the giving of the Court's instruction—I don't know the number, but it is an instruction formulated on the Defendant's Requested Instruction No. 1 having to do with the invitee question. The exception [1059] is taken first upon the ground that the Court should have determined as a matter of law that at the time and place of his injury, the minor plaintiff was an invitee. The exception is further taken to the instruction that part of the instruction, several parts of it, were to the effect that the jury must find that in going under the railroad cars or between the couplings, that he was expressly or impliedly permitted by the Northern Pacific to do that, it being the contention of the plaintiff that permission to go across the tracks in some proper fashion constituted the invitation,

which permission he had, and that the question whether or not he went through the coupling is a question bearing only on the question of contributory negligence.

Exception is further taken to the instruction, that part of it which reads that:

“To further assist you in determining whether or not he was an invitee, you are instructed that even though he was on the premises of the Northern Pacific by invitation, he would cease to be an invitee if he went to a place not covered by the invitation.”

Exception is taken on the ground that the only evidence in the case is that there was an implied invitation, and there had been for some ten years, for employees of the Addison Miller Company to use the ground north of Track 13 and, to [1060] use that ground, necessarily he had to cross Track 13.

Exception is further taken to that portion of the instructions which states it is the law that one who is on the premises of another by invitation ceases to be an invitee if he makes an unreasonable use of the premises in a more dangerous way than is reasonably contemplated. I do not think that is a proper statement of the law. If one is on premises by invitation and he is an invitee, he doesn't lose his status as an invitee merely because he might be guilty of negligence in using the premises as an invitee.

The Court: That isn't what the instruction said, of course. It said if he is invited for one purpose and uses it for another, he ceases to be an invitee. But go ahead.

Mr. MacGillivray: What I had in mind, he ceases to be an invitee if he makes an unreasonable use of the premises or uses the premises in a more dangerous way than was reasonably contemplated by the invitation. I believe, as I say, if he is there by invitation, an invitee, he doesn't lose that status merely because in using the premises, he uses the portion of the premises covered by the invitation in a negligent fashion. That merely goes to the question of contributory negligence.

The Court: Any other exceptions that anybody wishes to take in this assemblage? Do you have any?

Mr. Cashatt: I won't take any. [1061]

The Court: All right, bring in the jury.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: Now, members of the jury, I inadvertently overlooked giving one instruction which I will give you now and which you are to use only in case you should decide that your verdict is to be for the plaintiff, in which event you are instructed that the mortality tables show a white male of the age of 17 years has a life expectancy of 44.27 years. Mortality tables are not conclusive, but merely present the law of averages. You may take this life expectancy in connection with all of the other evidence, together with the plaintiff's physical condition prior to and at the time of the accident, in arriving at the amount of your verdict, if you find by a preponderance of the evidence that the plaintiff is to recover a verdict.

Now, also, I instructed that you were to take with you to the jury room the exhibits which have been admitted in evidence. There is excepted from that instruction Plaintiff's Exhibits 26 to 33, inclusive, which will not be sent to the jury room with the jury, and the Clerk is so instructed.

Now these supplemental instructions that I have given are merely because of oversight and are not to be [1062] given any particular emphasis because I have given them at this time, but are to be considered along with all my other instructions in the case.

You will now retire to consider your verdict.

Oh, yes, swear the bailiffs.

(Whereupon, the bailiffs were sworn to take the jury in charge, and the jury retired to consider its verdict at 11:35 p.m., this date.)

The Court: If I had known that this case was going to extend this late into the night, I would have put it over until tomorrow. But counsel didn't seem to have the facility of hurrying very much, I guess the Court didn't, either, but there seems very little prospect of getting a verdict within a reasonable time now. If they want to work, I will let them work for awhile, but eventually we will have to put them to bed and carry it over until tomorrow, anyway. But I think I will wait an hour, perhaps, and see if they are willing.

Court will recess subject to call. [1063]

[Endorsed]: Filed Nov. 23, 1954.

[Endorsed]: No. 14629. United States Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a corporation, Appellant, vs. Clara Stintzi, Guardian Ad Litem for Gerald Stintzi, a minor, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: January 20, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14629

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Appellant,
vs.

CLARA STINTZI, Guardian ad Litem of Gerald
Stintzi, a minor, Appellee.

APPELLANT'S STATEMENT OF POINTS

In compliance with Rule 17, sub-paragraph 6, of the above Court, Appellant states that the following are the points on which it intends to rely on this appeal:

1. That the District Judge should have ruled as a matter of law that plaintiff-appellee Gerald

Stintzi was not an invitee, but at best a licensee, on appellant's property at the time of his injury.

2. That, Gerald Stintzi being a licensee at best, the District Judge should have granted appellant's Motion for a Directed Verdict or appellant's Motion for a Judgment Notwithstanding the Verdict, since there was no claim or evidence that appellant breached any duty owing to licensees.

3. That, assuming Gerald Stintzi was an invitee, the District Court should have ruled as a matter of law that he was guilty of contributory negligence and accordingly should have granted appellant's Motion for a Directed Verdict or Motion for a Judgment Notwithstanding the Verdict.

4. That in any event the District Court committed errors of law because of which the cause should be remanded for a new trial in the following respects:

(a) The Court erred in admitting in evidence, over the objection of Appellant, testimony concerning portions of Rule 805 of the Consolidated Code of Operating Rules used by Northern Pacific Railway Company.

(b) The Court erred in admitting in evidence, over Appellant's objection, testimony concerning the blue flag rule found in said Consolidated Code of Operating Rules.

(c) The Court erred in admitting in evidence, over Appellant's objection, plaintiff's Exhibits 26 to 33, inclusive, and in permitting, over Appellant's objection, said colored slides to be projected onto an enlarged screen in a darkened courtroom.

(d) The Court erred in instructing the jury with reference to the Consolidated Code of Operating Rules.

(e) The Court erred in giving the following instruction to the jury:

“If you find that Addison-Miller, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi, in failing to provide a blue light for his protection on the icing dock, and if you further find that the defendant Northern Pacific Railway Company was also guilty of negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which contributed proximately in any measure to the injuries sustained by Gerald Stintzi, you are instructed that the negligence of Addison-Miller can not be imputed to Gerald Stintzi and Gerald Stintzi is not liable for such employer’s negligence, and you will therefore disregard any evidence of negligence of Gerald Stintzi’s employer and return your verdict for the plaintiff against the defendant Northern Pacific Railway Company, unless you should further find from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto.”

(f) The District Court erred in refusing to give that portion of Appellant’s requested instruction No. 3 reading as follows:

“You are further instructed that it is the law that one having a choice between methods of doing an

act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger.”

(g) The Court erred in refusing to give Appellant’s requested instruction No. 5.

(h) The Court erred in refusing to give Appellant’s requested instruction No. 6.

5. That the verdict was excessive and should be either reduced by this Court or a new trial directed.

Dated this 21st day of January, 1955.

CASHATT & WILLIAMS,

/s/ By LEO N. CASHATT,

/s/ By F. J. McKEVITT,

Acknowledgment of Service attached.

[Endorsed]: Filed January 24, 1955. Paul P. O’Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT’S DESIGNATION OF RECORD

Pursuant to Rule 17, sub-division 6, of the Rules of the above Court, Appellant designates the following portions of the record as material to the consideration of this appeal, to be incorporated in the printed transcript:

1. Complaint.

2. Petition for Removal.
3. Bond for Removal.
4. Notice of Filing Petition and Bond for Removal.
5. Amended Complaint.
6. Answer to Amended Complaint.
7. Plaintiff's Statement of Contentions.
8. Defendant's Statement of Contentions.
9. Exhibits 42, 47, and 51. (Note: Other exhibits received in evidence are deemed material to this appeal, but are not suitable for printing, and Appellant assumes that all original exhibits will be considered by the Court.)
10. Reporter's entire record of the proceedings and testimony at the trial.
11. Defendant's Requested Instructions Nos. 3, 5, and 6.
12. Verdict.
13. Judgment on the Verdict.
14. Motion to Set Aside Verdict and Judgment Entered Thereon and for Judgment in Accordance with the Defendant's Prior Motions for a Directed Verdict; and Alternative Motion for a New Trial.
15. Order Denying Defendant's motion to Set Aside Verdict and Judgment Entered thereon and for Judgment in accordance with Defendant's

Prior Motions for a Directed Verdict; and Alternative Motion for a New Trial.

16. Notice of Appeal.

17. Bond on Appeal.

18. Designation of Contents of Record on Appeal, directed to the District Court Clerk, pursuant to Rule 75 of the Federal Rules of Civil Procedure.

19. Order of District Judge Extending Time for docketing record with the United States Court of Appeals for the Ninth Circuit.

20. Statement of Points on which Appellant Intends to Rely, filed with the Court of Appeals for the Ninth Circuit, pursuant to its Rule 17, subparagraph 6.

21. This designation.

Dated this 21st day of January, 1955.

CASHATT & WILLIAMS,

/s/ By LEO N. CASHATT,

/s/ By F. J. McKEVITT,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed January 24, 1955. Paul P. O'Brien, Clerk.